



H-2B Temporary Labor Certification Process

Stakeholder Briefing Sessions

Boston, MA and Chicago, IL

September 2009

**Office of Foreign Labor Certification
Employment and Training Administration
United States Department of Labor**

H-2B Final Rule Briefing Outline

Section I Regulatory Overview

- Purpose and Scope
- Authority and Special Procedures
- Key Terms and Definitions

Section II Employer Application Filing

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Step 2: Obtaining Offered Wage Rate from NPC

Step 3: Pre-Filing Recruitment Efforts

Step 4: Application Filing & NPC Processing

Step 5: Post-Determination Actions

Section III Program Integrity Provisions

- Audit Examinations
- Supervised Recruitment
- Debarment



H-2B Final Rule Briefing



Briefing Section I

Regulatory Overview: *Purpose and Authority*



Purpose and Scope of Final Rule

20 CFR 655.1

- 20 CFR 655, Subpart A, sets out the procedures established by the Secretary of Labor to acquire information sufficient to make factual determinations of . . .
 1. Whether there are sufficient U.S. workers available who are capable of performing the temporary services or labor at the time of filing of the petition for H-2B classification and at the place where the foreign worker is to perform the work;
and
 2. Whether the employment of H-2B workers will adversely affect the wages and working conditions of workers in the U.S. similarly employed



Authority and Special Procedures

20 CFR 655.3
20 CFR 655.32

Authority of ETA-OFLC

- Labor certification determinations are made by the OFLC Administrator within USDOL-ETA who, in turn, may delegate this responsibility to a designated staff member (e.g., NPC Certifying Officer - CO)

Establishment of Special Procedures

- Provides a limited degree of flexibility in processing certain H-2B applications while not deviating from statutory requirements (e.g., tree planters, professional athletes, emergency boilermakers, and entertainers)
- OFLC Administrator has the authority to establish or to devise, continue, revise, or revoke special procedures
- Consultation with employer and worker representatives may be solicited before establishing special procedures



Key Terms and Definitions

Area of Intended Employment

20 CFR 655.4

- Area within normal commuting distance of the worksite of the job opportunity
- If within an MSA – any location in the MSA is deemed to be within the area of intended employment
- MSAs are not controlling – a location outside an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA



Key Terms and Definitions

Employer

20 CFR 655.4

- Person, firm, organization or other association or organization that:
 - Has a place of business in the US – physical location and means by which it may be contacted easily for employment
 - Employer relationship with H-2B employees or related U.S. workers
 - For purposes of filing, possesses a valid Federal Employer Identification Number (FEIN)



Where two or more employers each have a definitional indicia of employment with an employee, those employers may be considered to jointly employ that employee



Key Terms and Definitions

Job Contractor

20 CFR 655.4

- Must meet the definition of an employer and
 - Contracts services or labor on a temporary basis to other employers
 - Employer “clients” are not an affiliate, branch, or subsidiary of the job contractor
 - Does not exercise any supervision of the employees
 - Does not control the performances of any services
 - Only deals with hiring, paying, and firing of workers



Key Terms and Definitions

Employee

20 CFR 655.4

- General common law meaning
- Determination of employee status include:
 - Hiring party's right to control the manner and means by which work is accomplished
 - The skill required to perform the work
 - Source of instrumentalities and the tools accomplishing the work
 - Location of the work
 - Hiring party's discretion over time and length of work
 - Whether the work is part of the hiring party's regular business



Key Terms and Definitions

Offered Wage & Full-Time

20 CFR 655.4

Offered Wage

- Highest of the prevailing wage, Federal minimum wage, the State minimum wage, or local minimum wage

Full-Time

- 30 or more hours per week, except where a State or an established practice in an industry has developed a definition of full-time employment for any occupation that is less than 30 hours per week, that definition shall have precedence



H-2B Final Rule Briefing



Briefing Section II

Employer Application Filing: *Application Processing Model*



Pay Attention to Important “Icons”



Emphasizes important documentation requirements needed to support H-2B application



Indicates USDOL regulatory requirement contains a definite timeframe for response



Means employer signature is required



“Post-it” notes highlight important reminders for employers



Major Steps in H-2B Visa Application Process

Step 1
Understanding the General Filing Requirements

Step 2
Obtaining Offered Wage from NPC

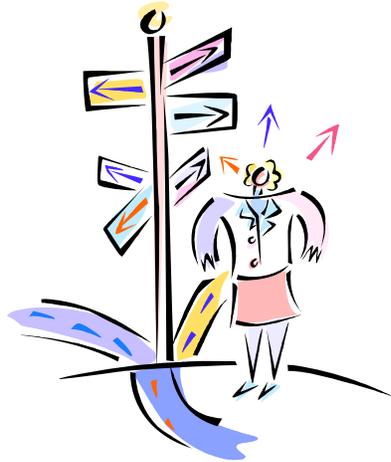
Step 3
Conducting Pre-Filing Recruitment Activities

Step 4
Application Filing & NPC Processing

Step 5
Post-Determination Actions



Navigating the H-2B Visa Program



Step 1 Understanding the General Filing Requirements



General Filing Requirements

General Provisions

20 CFR 655.20(b)

- Filed by a U.S. employer by U.S. Mail or private mail courier with the USDOL Chicago National Processing Center (NPC)
- Address changes will be published in the *Federal Register* as well as the USDOL Internet Web site at <http://www.foreignlaborcert.doleta.gov/>
- The Department may also require applications to be filed electronically in addition to or instead of by mail



General Filing Requirements

General Provisions (continued)

20 CFR 655.20(b)

Watch Out! Future Address Change Coming . . .



U.S. Department of Labor
Office of Foreign Labor Certification
Chicago National Processing Center
534 South Clark Street, 9th Floor
Chicago, Illinois 60605
Attn: H-2B Application Filing



Upcoming *Federal Register Notice* and OFLC website will make a formal announcement to stakeholders

When effective, the Department will continue to operate a courier service for 3 weeks to pick up correspondence mailed to the old Chicago address location



General Filing Requirements

General Provisions (continued)

20 CFR 655.20



Employer must submit the following documents to the Chicago NPC

- ✓ ETA Form 9142 – Application for Temporary Employment Certification
- ✓ Appendix B.1
- ✓ Recruitment Report

- Occupations involving special procedures must submit other required documents (e.g., itineraries)



The ETA Form 9142 must bear the original signature of the employer and, if applicable, that of the employer's authorized attorney or agent



General Filing Requirements

20 CFR 655.20

General Provisions (continued)

- An association or other organization of employers cannot file master applications on behalf of its employer-members under the H-2B program
- More than one worker may be requested on ETA Form 9142 as long as all H-2B workers are performing the same services
 - . . . on the same terms and conditions
 - . . . in the same occupation and area of employment; and
 - . . . during the same period of employment
- Except where special procedures apply, only one ETA Form 9142 may be filed for worksite(s) within an area of intended employment for each job opportunity



General Filing Requirements

Establishing Temporary Need

20 CFR 655.6

- To use the H-2B Program, the employer must establish that its need for nonagricultural services or labor is temporary
- Burden of proof is on the employer
- The employer's need is considered temporary if justified as either a:
 1. One-time occurrence;
 2. Seasonal need;
 3. Peakload need; or
 4. Intermittent need



*Absent an unusual circumstance, employers with recurring seasonal or peakload needs lasting longer than 10 months will be **denied**.*



General Filing Requirements

Establishing Temporary Need

20 CFR 655.6

- A job opportunity is temporary if the nature of the employer's need for the duties to be performed is temporary, whether or not the underlying job is permanent or temporary
- Part-time employment does not qualify for H-2B certification; only full-time employment will be certified
- A labor shortage, however severe, does not establish a temporary need under the H-2B classification

★ For job contractors, the Department examines the nature of the job contractor's need in addition to the needs of each individual employer-client

- Department applies a cumulative review of the temporary needs of contracting parties



General Filing Requirements

20 CFR 655.21

Statement of Temporary Need

- The employer's statement of temporary need on the ETA Form 9142 must address the following:
 - A description of the employer's business history, activities and schedule of operations throughout the year
 - An explanation of why the nature of the employer's job opportunity and number of foreign workers being requested reflect a temporary need
 - An explanation of how the request meets one of the regulatory standards of a one-time occurrence, seasonal, peakload or intermittent need
 - If applicable, a statement justifying any increase or decrease in the number of H-2B positions being requested from the previous year



General Filing Requirements

20 CFR 655.6

Establishing Temporary Need – One-Time Occurrence

- Employer must establish the following:
 - It has not employed workers to perform the services or labor in the past and it will not need the workers to perform the services or labor in the future
 - or
 - It has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker(s)



Generally, an employer's need is limited to less than a year, but in the case of a one-time event could last up to 3 years



General Filing Requirements

Establishing Temporary Need – Intermittent

20 CFR 655.6

- Employer must establish the following:
 - It has not employed permanent or full-time workers to perform the services or labor
- but**
- Occasionally or intermittently needs temporary workers to perform the services or labor for short periods



General Filing Requirements

20 CFR 655.6

Establishing Temporary Need – Seasonal

- Employer must establish the following:
 - The services or labor to be performed is traditionally tied to a season of the year by an event or pattern and is of a recurring nature
 - and
 - The period(s) of time during each year in which the employer does not need the services or labor



Employment is not seasonal if the period of need is unpredictable, subject to change, or considered a vacation period for the employer's permanent employees



General Filing Requirements

20 CFR 655.6

Establishing Temporary Need – Peakload

- Employer must establish the following:
 - It regularly employs permanent workers to perform the services or labor at the place of employment
 - and**
 - It needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand
 - and**
 - The temporary additions to staff will not become a part of the employer's regular operation (i.e., permanent staff)



General Filing Requirements

20 CFR 655.6

Key Distinctions Between Seasonal vs. Peakload

Seasonal

- Employer's need is clearly tied to a season and has a predictable pattern each year
- Quite often business operations “shut down” or do not employ workers at all in that occupation for part of the year
- It is possible for the business to operate year round, but the need for workers in the occupation is seasonal

Peakload

- Need for workers can be tied to one or more seasons or other short-term demand
- Business operations are year-round and employ workers in that occupation on a permanent basis
- Employer's need is “above and beyond” the existing workers employed in that occupation



General Filing Requirements

Employer Obligations and Assurances

20 CFR 655.22



As part of the ETA 9142 application, the employer must attest that it will abide by the following:

- ✓ The terms and conditions of employment are . . .
 - Normal to U.S. workers similarly employed in the area of intended employment
 - Not less favorable to U.S. workers than those offered to H-2B workers
- ✓ The job opportunity is . . .
 - Not vacant because the former occupant(s) is(are) on strike or lockout in the course of a labor dispute
 - Open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship



General Filing Requirements

20 CFR 655.22

Employer Obligations and Assurances (continued)

- ✓ Recruitment of U.S. workers was conducted in accordance with program requirements
- ✓ Unable to locate sufficient numbers of qualified U.S. workers and any U.S. worker applicants were rejected for only lawful, job-related reason(s)
- ✓ During the period of certified employment, the employer will . . .
 - Comply with Federal, State and local employment-related laws and regulations
 - Offer and pay the highest of the prevailing wage, the applicable Federal, State or local minimum wage



General Filing Requirements

20 CFR 655.22

Employer Obligations and Assurances (continued)

- ✓ The offered wage is not based on commission, bonuses, or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly or monthly basis that exceeds the prevailing wage, or the legal Federal, State or local minimum wage
- ✓ Deductions from the worker's pay shall be . . .
 - Required by law
 - Disclosed on the job offer if not required by law
 - Reasonable



An employer subject to the Fair Labor Standards Act (FLSA) may not make deductions that would violate the FLSA



General Filing Requirements

20 CFR 655.22

Employer Obligations and Assurances (continued)

- ✓ Employer has not laid off and will not lay off any similarly employed U.S. workers (120 days before and after start date of work), except where . . .
 - Job has/will be offered to those laid off U.S. workers
 - U.S. worker applicants either refused the job or were rejected for lawful, job-related reasons
- ✓ Employer and its attorney/agent have not sought or received payment from a prospective H-2B employee
- ✓ Employer has contractually forbidden any foreign labor contractor or recruiter to seek or receive payments from prospective employees (except costs that are responsibility of the worker – passport or visa fees)



General Filing Requirements

20 CFR 655.22

Employer Obligations and Assurances (continued)

- ✓ Unless the worker is sponsored by another employer, the employer will inform the worker that he/she is required to leave the U.S. at the end of the authorized period of stay
- ✓ Upon separation of employment with the employer, will notify DHS no later than 2 work days after the separation is discovered
 - Abandonment or abscondment begins after workers fails to report for 5 consecutive working days without employer consent
 - Workers may be terminated for cause



General Filing Requirements

20 CFR 655.22

Employer Obligations and Assurances (continued)

- ✓ Employer will not place any H-2B workers outside of the area of intended employment listed on the ETA Form 9142
- ✓ Job opportunity is a bona fide, full-time temporary position and the qualifications are normal to those of non-H-2B employers in the same area
- ✓ Dates of need, reason for temporary need, and number of positions being requested on ETA Form 9142 have been truly and accurately stated on the application



General Filing Requirements

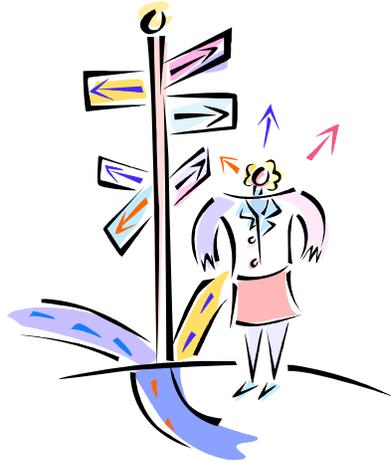
Special Employer Attestations for Job Contractors

20 CFR 655.22

- ✓ Job contractors will not place any H-2B workers with any other employer or at another employer worksite unless
 - Written inquiry is made to and written confirmation received from the other employer(s) regarding displacement or intention to displace similarly employed U.S. workers 120 days before and after the start date of work
 - All worksites are listed on the ETA Form 9142, including amendments or modifications



Navigating the Visa Program



Step 2

Obtaining Offered Wage Rate from the NPC



Offered Wage Rate Determination

General Provisions

20 CFR 655.10

- An employer must offer and advertise in its recruitment a wage rate that is the highest of the following:
 - Prevailing wage;
 - Federal minimum wage;
 - State minimum wage; or
 - Local minimum wage
- The employer must request and obtain a prevailing wage determination that is valid either on the date recruitment begins or the filing date of the ETA Form 9142
- No wage determination permits an employer to pay a wage lower than the highest wage required by any applicable Federal, State, or local wage law



Offered Wage Rate Determination

20 CFR 655.10

Submission of ETA Form 9141

- Employers will continue to file the ETA Form 9141 with the Chicago NPC through December 31, 2009
 - Chicago NPC will process all requests received as well as any redetermination requests or appeals

Pay Attention! On or after January 1, 2010, employers will begin filing the ETA Form 9141 only the *new* National Prevailing Wage Center in Washington, DC



The Department will announce the physical location of the Washington Prevailing Wage Center as well as the method(s) for filing requests in an upcoming notice in the Federal Register



Offered Wage Rate Determination

Prevailing Wage Determination

20 CFR 655.10(b)

- The prevailing wage will be:
 1. The wage rate set forth by a collective bargaining agreement (CBA) negotiated by the employer and the union; or
 2. If the job is not covered by a CBA, the prevailing wage is the arithmetic mean of the wages of workers similarly employed at the skill level in the area of intended employment
 - The arithmetic mean will be determined by:
 - The wage component of the BLS Occupational Employment Statistics (OES); or
 - An approved employer provided wage survey; or
 3. A current wage determination in the area determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act



Offered Wage Rate Determination

Prevailing Wage Determination

20 CFR 655.10(b)

- Upon making a prevailing wage determination (PWD), the NPC will:
 1. Enter its wage determination on the ETA Form 9141;
 2. Indicate the source of the wage; **and**
 3. Return the requested form with its endorsement within 30 days of receipt of the request
- The employer must offer at least this wage to both H-2B workers and any similarly employed U.S. workers



If the job opportunity involves multiple worksites within an area of intended employment and differing prevailing wage rates exist, the prevailing wage will be the highest applicable wage



Offered Wage Rate Determination Validity Period

20 CFR 655.10(d)-(e)

- The validity period of the prevailing wage determination must be:
 - No more than 1 year; or
 - Less than 3 months from the determination date
- Prevailing wage determination shall apply and be paid throughout the entire period of certified employment



When covered by professional sports league rules, the prevailing wage for a professional athlete is the wage set forth in the rules or regulations



Offered Wage Rate Determination

Employer Provided Surveys

20 CFR 655.10(f)

- An employer wage survey can be submitted either before or after the NPC issuance of a PWD based on the OES survey



The employer's survey must provide specific information about survey methodology, including:

1. Sample size;
2. Source;
3. Sample selection procedures; and
4. Survey job descriptions



Offered Wage Rate Determination

Employer Provided Surveys

20 CFR 655.10(f)

- The survey must meet the following publication timeframes:
 1. Has been published within 24 months of the date of submission; and
 2. Must be the most current edition of the survey; and
 3. Must be based on data collected not more than 24 months before the publication date



Offered Wage Rate Determination

Employer Provided Surveys

20 CFR 655.10(f)

- If the employer provided survey is not acceptable, the NPC must notify the employer in writing of the reasons
- After receiving notification, the employer may:
 1. File supplemental information;
 2. File a new request for a PWD;
 3. Appeal; or
 4. If an initial PWD was issued prior to submission of the survey, acquiesce to the initial wage determination



Offered Wage Rate Determination

Submission of Supplemental Information

20 CFR 655.10(g)

- Supplemental information may be submitted to the NPC where . . .
 - Employer disagrees with the assigned wage level;
 - Employer provided survey is not accepted; or
 - Employer has another legitimate basis for such a review
- NPC must consider one supplemental submission supporting a request for review
- NPC must inform the employer, in writing, of the reason(s) for not accepting the employer provided survey
- Employer may choose to (a) file a new request, (b) appeal, or (c) acquiesce to the initial wage determination



Offered Wage Rate Determination

Request for Review of Wage Determination

20 CFR 655.11



The employer may appeal a PWD determination to the NPC Certifying Officer within 10 days of the date that the PWD was issued

- The appeal must:
 1. Be postmarked no later than 10 days after the PW determination;
 2. Set forth the particular grounds for the request; and
 3. Include all materials submitted to the NPC
- The NPC Center Director will assign the appeal to a CO



Offered Wage Rate Determination

20 CFR 655.11

Request for Review of Wage Determination

- Upon receipt of the appeal, the CO may:
 1. Affirm the PWD;
 2. Modify the PWD; or
 3. Request review by BALCA

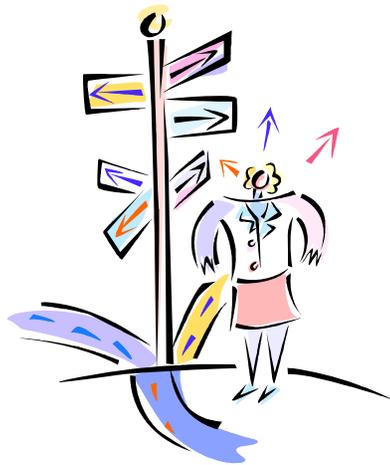


An employer requesting BALCA review must make a written request to the CO within 30 calendar days of the date of the decision

- BALCA will review the appeal based on the procedures at 20 CFR 655.33



Navigating the H-2B Visa Program



Step 3 Conducting Pre-Filing Recruitment Activities



Pre-Filing Recruitment Activity

General Provisions

20 CFR 655.15



Employer may not file the ETA Form 9142 until all of the pre-filing recruitment steps have been met



Employer must attest on the ETA Form 9142 that it has complied with all necessary steps of the recruitment process, including:

1. Submit a job order to the SWA serving the area of intended employment
2. Run two print advertisements in area of intended employment
3. If the employer is part of a CBA, contact the union for referrals of able, willing, qualified and available U.S. workers
4. Notification and consideration of laid-off U.S. workers, if applicable



Pre-Filing Recruitment Activity

20 CFR 655.15(e)

1. SWA Job Order



The employer must place an active job order with the SWA no more than 120 calendar days before the date of need

- Identify the job order as one to be used in connection with a future filed H-2B application
- Must meet content requirements of newspaper ads (20 CFR 655.17)
- The SWA must keep the job order open for no less than 10 calendar days
- If job opportunity covers worksites in the same area of intended employment covering multiple states, the employer will place the job order with the SWA where work will begin
- SWA will then transmit job order to all other states where work will be performed



Pre-Filing Recruitment Activity

20 CFR 655.15(f)

2. Newspaper Advertisements

- Employer must place an advertisement on 2 separate days, which may be consecutive, and one of which **must** be a Sunday
- The advertisements must be published in a newspaper . . .
 - Of general circulation serving the area of intended employment that has a reasonable distribution; **and**
 - Is appropriate to the occupation and the workers likely to apply for the position



Advertisements must be published only after the job order is placed for active recruitment by the SWA

- Advertisements must satisfy the requirements of 20 CFR 655.17



Pre-Filing Recruitment Activity

20 CFR 655.15(f)

2. Newspaper Advertisements (continued)

- If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the employer must advertise in a regularly published daily edition with the widest circulation in the area of intended employment
- Employer may use a professional, trade or ethnic publication if such publication is more appropriate to the occupation and workers likely to apply for the job opportunity
 - The requirement to place a newspaper advertisement on a Sunday cannot be waived in these circumstances



Pre-Filing Recruitment Activity

20 CFR 655.17

2. Newspaper Advertisements (continued)



Advertising Requirements

- ✓ Employer's name and appropriate contact information for U.S. workers to apply for the job opportunity
- ✓ Geographic area(s) of employment with specificity to apprise U.S. workers of any travel requirements
- ✓ If transportation to the worksite(s) will be provided, the advertisement must say so
- ✓ A description of the job opportunity with particularity (including job duties)



Pre-Filing Recruitment Activity

20 CFR 655.17

2. Newspaper Advertisements (continued)



Advertising Requirements (continued)

- ✓ Minimum education and experience requirements
- ✓ Indication whether on-the-job training will be provided
- ✓ Work hours and days
- ✓ Expected start and end dates of employment
- ✓ Indication whether overtime will be offered
- ✓ Wage offer or, if applicable, range of wage offers
- ✓ Total number of job openings
- ✓ Indication the position is “Temporary”



Pre-Filing Recruitment Activity

20 CFR 655.15(g)

3. Labor Organizations

- An employer that is part of a Collective Bargaining Agreement (CBA) must contact the union that is a party to the CBA for referrals of qualified U.S. workers



The contact must be by U.S. mail or other effective means and after the job order is placed for active recruitment by the SWA

- The employer must maintain dated logs demonstrating:
 - The union was contacted and notified of the openings;
 - Whether the union referred qualified workers and the number of workers referred or was non-response to the employer's request



Pre-Filing Recruitment Activity

20 CFR 655.15(h)

4. Layoff



If there has been a layoff of U.S. workers within 120 days of the first date of need, the employer must:

1. Document that it notified or will notify each laid off worker;
2. Has considered or will consider each laid off worker who expresses interest in the job opportunity and
3. Will maintain the results of the notification and consideration of U.S. workers



Pre-Filing Recruitment Activity

Recruitment Report

20 CFR 655.15(j)



In order to allow sufficient time for U.S. worker applicants to respond, the employer cannot prepare a final recruitment report until . . .

- At least 2 calendar days after the last date the SWA job order was posted; and
- At least 5 calendar days after the date of the last newspaper advertisement



The recruitment report must be signed and dated prior to filing the ETA Form 9142 and retained for 3 years



Pre-Filing Recruitment Activity

Recruitment Report (continued)

20 CFR 655.15(j)



Recruitment report must contain the following information:

- Identification of each recruitment source by name
- Name/contact information of each U.S. worker who applied for the job and the disposition of each worker, including any laid-off workers
- Explanation of the lawful job-related reason(s) for not hiring each U.S. worker

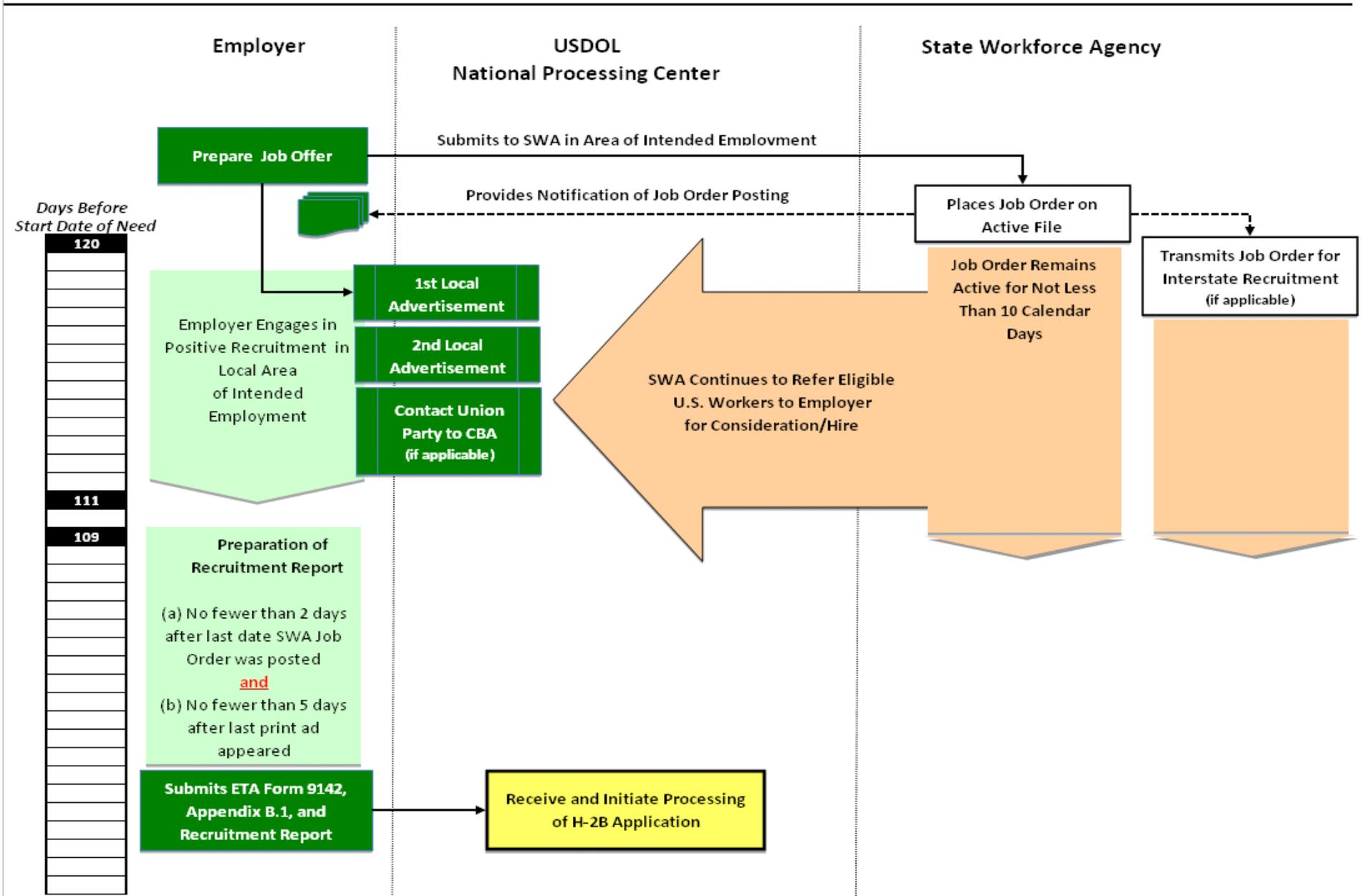


SAMPLE H-2B PROCESSING TIMEFRAMES (For Illustrative Purposes ONLY)

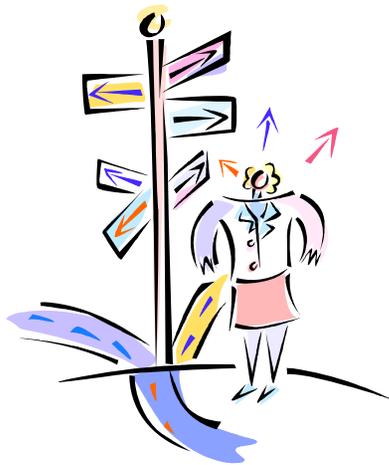
ASSUMPTIONS:

SWA Places Job Order for a Period 10 Calendar Days

Employer Places Newspaper Advertisements 2-3 Calendar Days of SWA Job Order Start Date



Navigating the H-2B Visa Program



Step 4 Application Filing & NPC Processing



NPC Application Processing Filing Requirements - Reminder

20 CFR 655.20



Employer will submit the following documents to the Chicago NPC

- ✓ ETA Form 9142 – Application for Temporary Employment Certification
- ✓ Appendix B.1
- ✓ Recruitment Report

- Occupations involving special procedures must submit other required documents (e.g., itineraries)



The ETA Form 9142 must bear the original signature of the employer and, if applicable, that of the employer's authorized attorney or agent



NPC Application Processing

General Provisions

20 CFR 655.23

- Upon receipt of the application, the NPC shall process on a First-In-First-Out (FIFO) basis and . . .
 - Review for obvious inaccuracies or omissions
 - Review for compliance with criteria for certification



If the Chicago NPC determines that the application fails to comply with one or more criteria for certification, the CO will issue a Request for Further Information (RFI) to the employer within 7 calendar days



Unless otherwise noted, any notice or request sent by the NPC to an applicant requiring a response shall be sent by means normally assuring next-day delivery, to afford the applicant sufficient time to respond



NPC Application Processing

General Provisions (continued)

20 CFR 655.23(b)

- Criteria for certification include, but are not limited to, whether the employer has . . .
 - Established that the need for nonagricultural services or labor is temporary in nature
 - Established that the number of positions being requested is justified and represent bona fide job opportunities
 - Made all assurances and met all obligations required by 20 CFR 655.22
 - Complied with all requirements of the program



NPC Application Processing RFI Requirements

20 CFR 655.23



The RFI must:

1. Specify the reason(s) why the application was not sufficient to grant temporary labor certification, citing relevant regulatory standards/special procedures;
2. Specify a date, not later than 7 calendar days from the date of the written RFI, that supplemental information must be received; and
3. State that, upon receipt of a response, or expiration of the deadline, the CO will review the existing application as well as any supplemental materials



NPC Application Processing RFI Requirements (continued)

20 CFR 655.23

- In unusual circumstances, the CO may issue one or more additional RFIs prior to issuing a final determination
- CO will issue a final determination or subsequent RFI within 7 business days of receiving the employer's response, or within 60 days of the employer's start date of need, whichever is later
- Compliance with RFI does not guarantee a certification determination from the CO; burden of proof is on the employer
- Failure to comply with RFI may result in a denial determination and/or supervised recruitment in future filings



NPC Application Processing

Issuance of Determinations

20 CFR 655.32

- NPC Certifying Officer (CO) will make a determination either to grant or deny the ETA Form 9142
- CO will certify where the employer has met all the regulatory requirements
- CO will determine that employment of H-2B workers will not adversely affect the wages and working conditions of similarly employed US workers; and that an insufficient number of qualified U.S. workers are available for the job opportunity
- CO will notify employer in writing (either electronically or by mail) of the labor certification determination



Issuance of Determinations

Full Certification

20 CFR 655.32(d)

- Employer or employer's agent or attorney will receive the following documents from USDOL
 - ✓ Final Determination letter
 - ✓ ETA Form 9142

★ Employer must file the certified ETA Form 9142 and appropriate documentation to the USCIS Service Center (see www.uscis.gov for more information)



Issuance of Determinations

Partial Certification

20 CFR 655.32(f)

- ★ CO may reduce either the period of need and/or the number of H-2B workers being requested for certification
 - Employer or employer's agent or attorney will receive the same documents from USDOL as those for "Full Certification"
 - Determination letter will include the following:
 - Reason(s) partial certification is being granted citing the relevant regulatory standards and/or special procedures
 - If applicable, address the availability of US workers
 - Notice of opportunity to request expedited administrative review
 - Statement indicating that if the employer does not request administrative review, the partial labor certification is final and the Department will not further consider the application



Issuance of Determinations

Denials

20 CFR 655.32(e)

- Employer or employer's agent or attorney will receive the following document from USDOL
 - ✓ Final Determination letter
- Determination letter will include the following:
 - Reason(s) certification is denied, citing the relevant regulatory standards and/or special procedures
 - If applicable, address the availability of US workers
 - Notice of opportunity to request expedited administrative review
 - Statement indicating that if the employer does not request administrative review, the partial labor certification is final and the Department will not further consider the application



Denials

Administrative Review

20 CFR 655.33



An employer that wishes to appeal its denied application must request review by the Board of Alien Labor Certification Appeals (BALCA) within 10 calendar days of the determination

- The request must:
 1. Be sent to BALCA with a simultaneous copy to the CO who denied the application
 2. Clearly identify the temporary labor certification for which review is sought
 3. Set forth the particular grounds for the request



The appeal may only contain legal arguments and evidence that was actually submitted to the CO



Denials

Administrative Review

20 CFR 655.33



Within 5 business days of receipt of the appeal, the counsel for the CO may submit a brief in support of the CO's decision via overnight delivery

- The Chief of the ALJ may designate a single member or a three member panel of BALCA to consider the case
- The BALCA may:
 - Affirm the denial;
 - Direct the CO to grant certification; OR
 - Remand to the CO for further action



BALCA should notify the employer, CO and counsel for the CO of its decision within 5 business days of submitted of the CO's brief or 10 days after receipt of the appeal file, whichever is earlier



Issuance of Determinations

Validity and Scope of Labor Certification

20 CFR 655.34

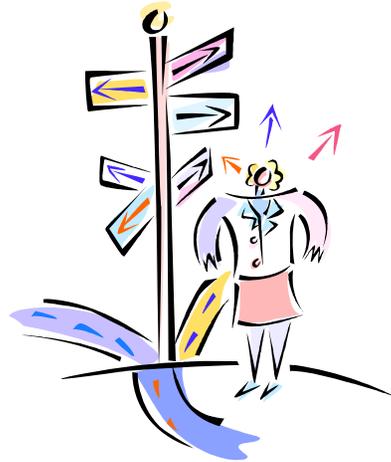
- The certified ETA Form 9142 (*as originally filed or amended*) may not be transferred from one employer to another and is valid **only** for the . . .
 - Beginning and end dates of employment ¹
 - Number of H-2B workers ²
 - Area(s) of intended employment
 - Specific services or labor to be performed
 - Employer specified on the ETA Form 9142

1 Except where either a short-term extension (2 weeks or less) is granted by DHS **or** a long-term extension is granted by the CO in which the beginning and/or end date of need is modified. Absent an extraordinary circumstance, long-term extensions will not be granted where the period of need lasts 12 months or more.

2 Except where the CO grants a request for a new determination based on unavailability of US workers



Navigating the H-2B Visa Program



Step 5 Post-Determination Actions



Post-Determination Actions

Document Retention Requirements

- Employers receiving certification must retain records and documents supporting the ETA Form 9142



Retention period of documents is 3 years from date of certification

- All applicants must retain the following documents:
 - Evidence substantiating temporary need 20 CFR 655.6
 - Prevailing Wage Determination documentation. 20 CFR 655.10(i)
 - Advertisement and recruitment efforts. 20 CFR 655.15
 - Documentation that laid off workers were notified of the job opportunity. 20 CFR 655.15(h)
 - Recruitment report. 20 CFR 655.15(j)
 - Evidence substantiating obligations and assurances (where applicable) 20 CFR 655.22



Employers are **not required** to retain records and documents where the Secretary issues a denial determination



Post-Determination Actions Notice of Departure to Workers

20 CFR 655.35

Limit to Worker's Stay

- A foreign worker may not remain in the US beyond his/her . . .
 - Authorized period of stay established by DHS; or
 - Separation from employment prior to completion of H-2B work contract
- Absent an extension or change in worker's status by DHS, the period of stay is based upon validity period of DOL labor certification

Notice to Worker

- Employers must notify each H-2B worker **upon starting work** of the requirement to register his/her departure from the US at the conclusion of employment
- Registration is required for H-2B workers departing the US by land at the place and in the manner prescribed by DHS
- ★ Employer obligation begins **only after** DHS establishes a formal program for registration of departure



Navigating the H-2B Visa Program



Briefing Section III

H-2B Final Rule Program Integrity Provisions



Integrity Provisions

Audit Examinations

20 CFR 655.24

- Conducted on certified H-2B applications chosen at sole discretion by the Department
- Written notice provided to employer specifying . . .
 - Date on which documentation must be received by CO
(*no fewer than 14 and no more than 30 calendar days*)
 - Documentation or other relevant information regarding the application which must be submitted
 - Sanctions in the event of failure to comply with audit examination or material misrepresentation on the application
(*supervised recruitment, debarment*)



CO has authority to request supplemental information and/or documentation from the employer to complete the audit examination



Integrity Provisions

Audit Examinations

20 CFR 655.24

- CO will issue a “Notice of Audit Findings” following completion of the audit examination
- Written notice may result in . . .
 - Affirmation of compliance with program requirements
 - Requirement to conduct supervised recruitment in future filings (up to 2 years)
 - Referral to debarment proceedings at 20 CFR 655.31
 - Referral to DHS, ESA-Wage and Hour, or other enforcement agency
 - Referral to DOJ Civil Rights Division



Integrity Provisions

Supervised Recruitment

20 CFR 655.30

- Triggered where the employer is found to have . . .
 - Violated program requirements
 - Made a material misrepresentation to the Department
 - Failed to adequately conduct recruitment activities
 - Failed any obligation under the regulations
- Labor market test conducted in a manner consistent with pre-filing recruitment requirements except
 - 🕒 Employer supplies draft ads to CO for approval no fewer than 150 calendar days before date of need
 - Upon approval, CO will issue recruitment instructions
 - Employer notifies CO when ads/SWA job order have been placed



Integrity Provisions

Supervised Recruitment

20 CFR 655.30



Employer must prepare a signed, detailed recruitment report no fewer than:

- 2 days after the date of the last posting of the job order
- AND**
- 5 calendar days after the date of the last newspaper advertisement



Recruitment report due to the CO **within 30 days of the date of the first newspaper advertisement** containing . . .

1. A copy of all advertisements (including dates)
2. A copy of the SWA job order (including dates)



Integrity Provisions

Debarment

20 CFR 655.31

- Imposed by OFLC Administrator for up to 3 years
- Notice of Intent to Debar must be issued within 2 years of the violation
- Entities that can be debarred
 - Employer commits substantial violation of a material term or condition of the labor certification
 - Agent/attorney participated in, had knowledge of, or had reason to know of, the employer's substantial violation
- Employer is provided due process to rebut debarment notice from OFLC Administrator
- If upheld by OFLC Administrator, employer has opportunity to request hearing before Administrative Law Judge



Application for Prevailing Wage Determination
ETA Form 9141
U.S. Department of Labor



Please read and review the instructions carefully before completing this form and print legibly. A copy of the instructions can be found at <http://www.foreignlaborcert.doleta.gov/>.

A. Employment-Based Visa Information

1. Indicate the type of visa classification supported by this application (<i>Write classification symbol</i>): *	
---	--

B. Requestor Point-of-Contact Information

1. Contact's last (family) name *	2. First (given) name *	3. Middle name(s) *
4. Contact's job title *		
5. Address 1 *		
6. Address 2		
7. City *	8. State *	9. Postal code *
10. Country *	11. Province	
12. Telephone number *	13. Extension	14. Fax Number
15. E-Mail Address		

C. Employer Information

1. Legal business name *		
2. Trade name/Doing Business As (DBA), if applicable §		
3. Address 1 *		
4. Address 2		
5. City *	6. State *	7. Postal code *
8. Country *	9. Province	
10. Telephone number *	11. Extension	
12. Federal Employer Identification Number (FEIN from IRS) *	13. NAICS code (must be at least 4-digits) *	

D. Job Offer Information

a. Job Description:

1. Job Title *	
2. Suggested SOC (ONET/OES) code *	2a. Suggested SOC (ONET/OES) occupation title *

Application for Prevailing Wage Determination
ETA Form 9141
U.S. Department of Labor



a. Job Description *(continued)*

3. Number of hours of work per week * Basic: _____ Overtime*: _____	3a. Hourly Work Schedule * A.M. (h:mm): ____ : ____ P.M. (h:mm): ____ : ____
4. Job Title of Supervisor for the Workers (if applicable) §	
5. Does this position supervise the work of other employees? * <input type="checkbox"/> Yes <input type="checkbox"/> No	5a. If yes, number of employees worker § will supervise (if applicable) _____
6. Job duties – A description of the job duties to be performed MUST begin in this space. If necessary, add attachment to <u>continue and complete</u> description. *	
7. Will travel be required in order to perform the job duties? * <input type="checkbox"/> Yes <input type="checkbox"/> No	7a. If “Yes”, please explain the travel requirements: §
8. Are there any other working conditions that affect the rate of pay? * <input type="checkbox"/> Yes <input type="checkbox"/> No	8a. If “Yes”, please specify the working conditions. §

Application for Prevailing Wage Determination
ETA Form 9141
U.S. Department of Labor



b. Minimum Job Requirements:

1. Education: minimum U.S. diploma/degree required *	
<input type="checkbox"/> None <input type="checkbox"/> High School/GED <input type="checkbox"/> Associate's <input type="checkbox"/> Bachelor's <input type="checkbox"/> Master's <input type="checkbox"/> Doctorate (PhD) <input type="checkbox"/> Other degree (JD, MD, etc.)	
1a. If "Other degree" in question 1, specify the diploma/degree required §	1b. Indicate the major(s) and/or field(s) of study required § (May list more than one related major and more than one field)
2. Does the employer require a second U.S. diploma/degree? *	
<input type="checkbox"/> Yes <input type="checkbox"/> No	
2a. If "Yes" in question 2, indicate the second U.S. diploma/degree and the major(s) and/or field(s) of study required §	
3. Is training for the job opportunity required? *	
<input type="checkbox"/> Yes <input type="checkbox"/> No	
3a. If "Yes" in question 3, specify the number of <u>months</u> of training required §	3b. Indicate the field(s)/name(s) of training required § (May list more than one related field and more than one type)
4. Is employment experience required? *	
<input type="checkbox"/> Yes <input type="checkbox"/> No	
4a. If "Yes" in question 4, specify the number of <u>months</u> of experience required §	4b. Indicate the occupation required §
5. Special Requirements - List specific skills, licenses/certificates/certifications, and requirements of the job opportunity. *	

c. Place of Employment Information:

1. Worksite address 1 *	
2. Address 2	
3. City *	4. County *
5. State/District/Territory *	6. Postal code *
7. Will work be performed in multiple worksites within an area of intended employment or a location(s) other than the address listed above? *	
<input type="checkbox"/> Yes <input type="checkbox"/> No	
7a. If Yes in question 7, identify the geographic place(s) of employment with as much specificity as possible. If necessary, submit an attachment to <u>continue and complete</u> a listing of all anticipated worksites. §	

Application for Prevailing Wage Determination
 ETA Form 9141
 U.S. Department of Labor



E. Prevailing Wage Determination

FOR OFFICIAL GOVERNMENT USE ONLY	
1. PW tracking number	2. Date PW request received
3. SOC (ONET/OES) code	3a. SOC (ONET/OES) occupation title
4. Prevailing wage \$ _____ . _____	4a. Wage level <input type="checkbox"/> I <input type="checkbox"/> II <input type="checkbox"/> III <input type="checkbox"/> IV <input type="checkbox"/> N/A
5. Per: (Choose only one) <input type="checkbox"/> Hour <input type="checkbox"/> Week <input type="checkbox"/> Bi-Weekly <input type="checkbox"/> Month <input type="checkbox"/> Year <input type="checkbox"/> Piece Rate	
5a. If Piece Rate is indicated in question 2, specify the wage offer requirements :*	
6. Prevailing wage source (Choose only one) <input type="checkbox"/> OES <input type="checkbox"/> CBA <input type="checkbox"/> DBA <input type="checkbox"/> SCA <input type="checkbox"/> Other/Alternate Survey	
6a. If "Other/Alternate Survey" in question 6, specify	
7. Additional Notes Regarding Wage Determination	
8. Determination date	9. Expiration date

F. OMB Paperwork Reduction Act (1205-0466)

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's reply to these reporting requirements is mandatory to obtain the benefits of temporary employment certification (Immigration and Nationality Act, Section 101). Public reporting burden for this collection of information is estimated to average 55 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Office of Foreign Labor Certification * U.S. Department of Labor * Room C4312 * 200 Constitution Ave., NW * Washington, DC * 20210. **Do NOT send the completed application to this address.**

ETA Form 9141 – General Instructions for the 9141
U.S. Department of Labor



IMPORTANT: Please read these instructions carefully before completing the ETA Form 9141 –Application for Prevailing Wage Determination. These instructions contain full explanations of the questions that make up the ETA Form 9141.

Anyone, who knowingly and willingly furnishes any false information in the preparation of ETA Form 9142 and any supporting documentation, or aids, abets, or counsels another to do so is committing a federal offense, punishable by fine or imprisonment up to five years or both (18 U.S.C. §§ 2, 1001). Other penalties apply as well to fraud or misuse of this immigration document and to perjury with respect to this form (18 U.S.C. §§ 1546, 1621).

OMB Paperwork Reduction Act (1205-0466)

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's reply to these reporting requirements is mandatory to obtain the benefits of temporary employment certification (Immigration and Nationality Act, Section 101). Public reporting burden for this collection of information is estimated to average 55 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Office of Foreign Labor Certification * U.S. Department of Labor * Room C4312 200 Constitution Ave., NW * Washington, DC * 20210. **Do NOT send the completed application to this address.**

Symbol Legend: * means that the information requested is mandatory.

§ means the information requested is mandatory if the previous question was answered in the affirmative or in the manner specified in the marked question.

Section A

Employment - Based Nonimmigrant Visa Information

1. Enter the following classification symbol to indicate the type of visa supported by this application: "**H-2B**", "**H-1B**", "**H-1B1 Chile**", "**H-1B1 Singapore**", "**E-3 Australian**", "**PERM**"

Section B

Requestor Point-of-Contact Information

1. Enter the last (family) name of the requestor's point of contact.
2. Enter the first (given) name of the requestor's point of contact.
3. Enter the middle name of the requestor's point of contact.
4. Enter the job title of the requestor 's point of contact.
5. Enter the business street address for the requestor's point of contact.
6. If additional space is needed for the street address, use this line to complete the street address.
7. Enter the city of the requestor's point of contact. If the city and country are the same, the name must still be entered in both fields.
8. Enter the state of the requestor's point of contact.
9. Enter the postal (zip) code of the requestor's point of contact.
10. Enter the country of the requestor's point of contact. If the city and country are the same, the name must still be entered in both fields.
11. Enter the province of the requestor's point of contact, if applicable.
12. Enter the area code and business telephone number of the requestor's point of contact. Include country code, if applicable.

ETA Form 9141 – General Instructions for the 9141
U.S. Department of Labor



13. Enter the extension of the telephone number of the requestor's point of contact, if applicable.
14. Enter the business fax number, if applicable.
15. Enter the business e-mail address of the requestor's point of contact in the format [name@emailaddress.top-level](#) domain, if applicable.

Section C
Employer Information

1. Enter the full legal name of the business, person, association, firm, corporation, or organization, i.e., the employer filing this application. The employer's full legal name is the exact name of the individual, corporation, LLC, partnership, or other organization that is reported to the Internal Revenue Service.
2. Enter the full trade name or "Doing Business As" (DBA) name, if applicable, of the business, person, association, firm, corporation, or organization, i.e., the employer filing this application.
3. Enter the street address of the employer's principal place of business.
4. If additional space is needed for the street address, use this line to complete the employer's street address.
5. Enter the city of the employer's principal place of business. If the city and country are the same, the name must still be entered in both fields.
6. Enter the state of the employer's principal place of business.
7. Enter the postal (zip) code of the employer's principal place of business.
8. Enter the country of the employer's principal place of business. If the city and country are the same, the name must still be entered in both fields.
9. Enter the province of the employer's principal place of business, if applicable.
10. Enter the area code and telephone number for the employer's principal place of business. Include country code, if applicable.
11. Enter the extension of the telephone number for the employer's principal place of business, if applicable.
12. Enter the nine-digit Federal Employer identification Number (FEIN) as assigned by the IRS. Do not enter a social security number.

Note: All employers, including private households, MUST obtain an FEIN from the IRS before completing this application. Information on obtaining an FEIN can be found at www.irs.gov.

13. Enter the four to six-digit North American Industry Classification System (NAICS) code that best describes the employer's business, not the alien's job. A listing of NAICS codes can be found at <http://www.census.gov/epcd/www/naics.html>

Section D
Job Offer Information

a. Job Description

1. Enter the title of the job opportunity.
 2. Enter the six or eight-digit Standard Occupational Classification (SOC)/Occupational Network (O*NET) code for the occupation, which most clearly describes the work to be performed. [SOC/O*Net Search Wizard](#)
- 2a. Enter the occupational title associated with the SOC/O*NET (OES) code. [SOC/O*Net Search Wizard](#)

ETA Form 9141 – General Instructions for the 9141
U.S. Department of Labor



3. Enter the basic hours of work required per week and overtime hours per week in accordance with State and Federal law for the work and area of employment.
- 3a. Enter the daily work schedule for the job opportunity (e.g., 9 a.m. to 5 p.m., 7 a.m. to 11 a.m. and 4 p.m. to 8 p. m.).
4. Identify the title of the supervisor who will be supervising the work of the foreign worker(s), if applicable.
5. Mark "Yes" or "No" as to whether the job opportunity supervises the work of other employees.
- 5a. If "Yes" is marked in question 4, enter the total number of employees the job opportunity will supervise.
6. Describe the job duties, in detail, to be performed by any worker filling the job opportunity. Specify any equipment to be used and pertinent working conditions.
7. Mark "Yes" or "No" as to whether the job requires any travel.
- 7a. Explain the travel requirements, if any.
8. Mark "Yes" or "No" as to whether there are any other working conditions that may affect pay.
- 8a. Explain the working conditions.
- b. Minimum Requirements**
1. Identify whether the minimum U.S. diploma or degree required by the employer for the job opportunity is none, high school/GED, Associates, Bachelor's, Master's, Doctorate, or Other. Only mark one box.
- 1a. If "Other" in question 1, enter the specific U.S. diploma or degree required. (Example: JD, MD, DDS, etc.). If the answer to question 1 is not "Other," enter "N/A."
- 1b. Enter the major(s) and/or field(s) of study required by the employer for the job opportunity. You may list more than one field and/or more than one related major. If the answer to question 1 is "None" or "High School", enter "N/A."
2. If the employer requires a second U.S. diploma or degree for the job opportunity, mark "Yes." Otherwise, mark "No."
- 2a. If "Yes" in question 2, enter the specific second U.S. diploma or degree required. If the answer to question 2 is "No", enter "N/A."
3. If the employer requires training for the job opportunity, mark "Yes." Otherwise, mark "No." Training may include, but is not limited to: programs, coursework, or training experience (other than employment). When answering this question, do not duplicate requirements – the training required should not be counted as education or experience required.
- 3a. If "Yes" in question 3, enter the number of months of training required by the employer for the job opportunity. If the answer to question 3 is "No", enter "0" (zero). When answering this question, do not duplicate time requirements – the training time required should not be counted as (added to) education or experience time required.
- 3b. If "Yes" in question 3, enter the field(s) and/or name(s) of the training required by the employer for the job opportunity. You may list more than one field and/or more than one name. If the answer to question 3 is "No", enter "N/A."
4. If the employer requires employment experience, mark "Yes." Otherwise, mark "No."
- 4a. If "Yes" in question 4, enter the number of months of experience required by the employer. If the answer to question 4 is "No", enter "0" (zero).
- 4b. If "Yes" in question 4, enter the occupation in which experience is required by the employer for the job opportunity. If the answer to question 4 is "No", enter "N/A."
5. Enter the job related special requirements. Examples are shorthand and typing speeds, specific foreign language proficiency, test results. Document business necessity for a foreign language requirement.

Application for Prevailing Wage Determination
ETA Form 9141 – General Instructions for the 9141
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Section D
Job Offer Information *(continued)*

c. Place of Employment

It is important for the employer to define the area of intended employment with as much geographic specificity as possible. This information is used for purposes of reviewing and verifying regulatory compliance with advertising, positive recruitment requirements, and prevailing wage determinations.

1. Enter the street address of the worksite location identified in question 1, where work will be performed. The worksite address must be a physical location and cannot be a P.O. Box.
 2. If additional space is needed for the street address, use this line. If no additional space is needed, enter "N/A."
 3. Enter the city of the worksite location.
 4. Enter the county of the worksite location.
 5. Enter the state/district/territory of the worksite location.
 6. Enter the postal (zip) code of the worksite location.
 7. If work will be performed in location(s) in addition to the address listed in questions 1-6 above, mark "Yes" and complete question 7-A. If work will not be performed in location(s) other than the address listed in questions 1-6 above, mark "No."
- 7-A. If "Yes" in question 7, identify the geographic place(s) of employment with as much specificity as possible, such as the Metropolitan Statistical Areas (MSAs) or the city(ies)/township(s)/county(ies) and the corresponding state(s) where work will be performed. The employer must provide enough geographic detail to cover all the worksite locations of intended employment.

Section E

Prevailing Wage Determination – DO NOT FILL OUT THIS SECTION – FOR GOVERNMENT USE ONLY.

This section will be filled out by the government and returned to you with the appropriate prevailing wage.

Section F

OMB Notice – Please read.

Wage and Hour Division (WHD)



U.S. Department of Labor

Employment Standards Administration
Wage & Hour Division
Washington D.C. 20210

August 21, 2009

FIELD ASSISTANCE BULLETIN NO. 2009-2

MEMORANDUM FOR: REGIONAL ADMINISTRATORS
DISTRICT DIRECTORS

FROM: JOHN L. McKEON
Deputy Administrator

SUBJECT: Travel and Visa Expenses of H-2B Workers Under the FLSA

As Field Assistance Bulletin No. 2007-1 explains, the H-2B visa program of the Immigration and Nationality Act (INA) allows employers to hire foreign workers to meet a temporary need for nonprofessional, nonagricultural skills, after the Employment Training Administration has issued an H-2B labor certification for use in securing the visa. When that Bulletin was issued on May 2, 2007, the Wage and Hour Division had no direct authority to enforce the conditions of H-2B visa petitions, including the prevailing wage. However, as that Bulletin clarifies, the INA does not preclude Wage and Hour from enforcing other laws (*e.g.*, the FLSA, SCA, DBRA, MSPA, and OSH Act FS/TLC) with respect to H-2B workers.

In January 2009, the Department of Homeland Security delegated to Wage and Hour enforcement authority to ensure that H-2B workers are employed in compliance with the H-2B labor certification requirements. Wage and Hour issued regulations implementing this authority, 29 C.F.R. Part 655, which became effective on January 18, 2009. Those regulations are applicable to applications for certifications filed on or after that date.

In light of Wage and Hour's new enforcement authority with regard to H-2B workers, it is important to address the interaction of the H-2B program and the FLSA. In particular, as explained below, Wage and Hour has concluded under the FLSA that the transportation expenses and visa fees of H-2B employees are primarily for the benefit of the employer. Therefore, this Bulletin clarifies that employers are responsible for paying the transportation and visa expenses of H-2B employees, where shifting these costs to employees would effectively bring their wages below the FLSA minimum wage in their first workweek of employment. The H-2B program requires employers to pay employees at least the prevailing wage. The prevailing wage must be at least the highest wage required by any applicable federal, state, or local law; therefore, the required prevailing wage may be higher than the FLSA minimum wage. The employer may be further constrained in the types and amounts of deductions that can be taken under the H-2B program, but that issue will be addressed at a later time and is beyond the scope of this Bulletin.

FLSA Analysis:

Section 3(m) of the FLSA, 29 U.S.C. 203(m), allows an employer to count as wages the reasonable cost of "furnishing [an] employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees." The regulations define "other facilities" as "something like board or lodging" and provide that "other facilities" include "general merchandise furnished at company stores and commissaries (including articles of food, clothing, and household effects); fuel . . . electricity, water and gas furnished for the noncommercial personal use of the employee; [and] transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment." 29 C.F.R. § 531.32(a).

"The cost of furnishing 'facilities' found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages." 29 C.F.R. § 531.3(d)(1); *see* 29 C.F.R. § 531.32(c). The regulations provide, for example, that items such as the following are primarily for the convenience of the employer: uniforms where the nature of the business requires the employee to wear a uniform; tools of the trade; explosives; miner's lamps; electric power used for commercial production; company guard protection; taxes and insurance on the employer's buildings which are not used for lodgings furnished to the employee; dues paid to chambers of commerce and other organizations; medical services and hospitalization that the employer is bound to furnish under worker's compensation or other similar laws; and "transportation charges where such transportation is an incident of and necessary to the employment (as in the case of maintenance-of-way employees of a railroad)." 29 C.F.R. § 531.32(c); *see* 29 C.F.R. § 531.3(d)(2).

Under the FLSA, there is no legal difference between deducting a cost from a worker's wages and shifting a cost to an employee to bear directly. As the court stated in *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1236 (11th Cir. 2002) (citations

omitted), “[a]n employer may not deduct from employee wages the cost of facilities which primarily benefit the employer if such deductions drive wages below the minimum wage. See 29 C.F.R. § 531.36(b). This rule cannot be avoided by simply requiring employees to make such purchases on their own, either in advance of or during the employment.” This is so because wages are not truly “received” unless they are paid “free and clear” and, thus, an employee cannot “kick-back” directly or indirectly to the employer or to another person for the employer’s benefit any part of the wage delivered to the employee. 29 C.F.R. § 531.35; see *Castellanos-Contreras v. Decatur Hotels, L.L.C.*, 2009 WL 2152622, at *5 (5th Cir. 2009), quoting *Mayhue’s Super Liquor Stores, Inc. v. Hodgson*, 464 F.2d 1196, 1199 (5th Cir. 1972) (An employer-imposed requirement “is a kick-back if it ‘tend[s] to shift part of the employer’s business expense to the employees.’”). “For example, if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer’s particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act.” 29 C.F.R. § 531.35. If an employee incurs pre-employment expenses that are primarily for the benefit of the employer, they are considered *de facto* deductions from the employee’s wages during the first workweek and such deductions must be reimbursed to the extent that the costs incurred effectively reduce the employee’s wages below the minimum wage.

In light of these principles, and assuming that the transportation and other expenses could potentially qualify as “other facilities” that are “something like board or lodging” (*see infra*, p. 11, n.4), the question is whether these expenses for H-2B nonimmigrant workers are “an incident of and necessary to the employment,” and therefore are primarily for the benefit and convenience of the employer. The expenses at issue here have some value and benefit for both the employer and the employee. The employer benefits because it obtains workers in a situation where the employer has determined, and the Department of Labor has certified, that there are not sufficient able, willing and qualified U.S. workers available to perform the work and, thus, foreign workers must be brought into the United States for temporary employment. The workers receive the benefit of a temporary job and temporary entry into the United States. Thus, the question is which party should be viewed as the primary beneficiary of the transportation and other expenses.

The Wage and Hour Division has addressed this general issue a number of times over the years. Over a period of 30 years beginning in 1960, Wage and Hour issued a series of opinion letters consistently concluding that the cost of transporting remotely hired temporary employees to and from the point of hire is a cost that must be borne by the employer, as a cost incidental to the employer’s recruitment program, because the transportation is primarily for the employer’s benefit; therefore, such transportation costs could not reduce the employees’ wages below the required minimum wage. *See, e.g.*, Opinion Letters dated May 11, 1960; February 4, 1969; November 10, 1970; November 28, 1975; September 26, 1977; March 6, 1979; November 28, 1986; and June 27, 1990 (1990 WL 712744); *see also* Field Operations Handbook, 30c13(e). The Department successfully asserted this position in litigation in *Marshall v. Glassboro Service Ass’n*,

Inc., 1979 WL 1989 (D.N.J. 1979) (subsequent history omitted), where the court referred to the Administrator's earlier opinion letters and stated that the cost of transporting migrant farmworkers from Puerto Rico to New Jersey "cannot properly be included in the computation of the employees' minimum wages."

In a letter dated May 11, 1994, Secretary Reich noted this longstanding interpretation, but stated that agricultural growers had raised concerns about its costs to employers and the possible destabilization of the agricultural work force. The Secretary recognized, however, that there also was a need to protect farmworkers' wages. Therefore, he stated that the Administrator of Wage and Hour would examine the issue to determine whether an opinion letter or rulemaking should be used to provide further guidance. The letter concluded that, "pending resolution of the policy and procedural issues relating to the treatment of transportation expenses, we are not prepared to assert violations in this area under the FLSA." The Administrator repeated these points in a June 30, 1994, letter.

In a letter dated May 10, 1996, Wage and Hour clarified that its "policy remains that worker-incurred transportation costs from the point of remote hire to the worksite are primarily for the benefit of the employer." The letter stated that the Department would continue to assert a violation of the FLSA where the employee either pays the transportation costs directly to the employer or its agent, or reimburses such costs advanced by the employer or its agent (such as through deductions from pay), where such payments result in the employee receiving less than the minimum wage. However, as an enforcement practice, Wage and Hour stated it would not assert a violation with regard to workers in the H-2A program if they received inbound transportation reimbursement by the time they completed 50% of their contract work period or immediately thereafter, as required by the H-2A regulations. ¹¹ With regard to a situation where a worker directly incurred the cost of transportation from the location where he or she was remotely hired to the worksite, without any advance or other direct involvement of the employer, the letter repeated the Secretary's nonenforcement policy, pending further review. The Assistant Secretary for Congressional and Intergovernmental Affairs reaffirmed this interpretation and enforcement practice in a May 30, 2001, letter to Senator John Warner.

In 2002, the Eleventh Circuit in *Arriaga*, while recognizing that the DOL letters were consistent over a lengthy period, independently evaluated whether such transportation costs are "an incident of and necessary to the employment." 305 F.3d at 1241. The court considered the dictionary definitions of the regulatory terms ("incident" meaning "anything which inseparably belongs to, or is connected with, or inherent in, another thing" and "necessary" meaning "of an inevitable nature: inescapable"). 305 F.3d at 1242. The court emphasized that the visa program involves workers performing temporary work. It stated that, by participating in the visa program, the employers understand that the nonimmigrant alien workers they employ are not coming from commutable distances. In that situation, one-time transportation costs are:

an inevitable and inescapable consequence of having foreign H-2A workers employed in the United States; these are costs which arise out of

the employment of H-2A workers. When a grower seeks employees and hires from its locale, transportation costs that go beyond commuting are not necessarily going to arise from the employment relationship. Employers resort to the H-2A program because they are unable to employ local workers who would not require such transportation costs; transportation will be needed, and not of the daily commuting type, whenever employing H-2A workers.

305 F.3d at 1242.

The *Arriaga* court further concluded that long-distance transportation costs are primarily for the benefit of the employer because they are nothing like board and lodging; they are one-time costs that arise from the employment itself, not “universally ordinary living expenses that one would incur in the course of life outside of the workplace,” as are the “other facilities” listed in the regulations (such as electricity, gas or water for the employee’s personal use). 305 F.3d at 1243. *Accord, e.g., DeLeon v. Eller & Sons Trees Inc.*, 581 F. Supp. 2d 1295 (N.D. Ga. 2008) (H-2B); *Rosales v. Hispanic Employee Leasing Program*, 2008 WL 363479 (W.D. Mich. 2008) (H-2B); and *Rivera v. Brickman Group*, 2008 WL 81570 (E.D. Pa. 2008) (H-2B).

Finally, the *Arriaga* court noted that some categories of costs are “more nuanced” than others and “are primarily for the benefit of the employer or the employee depending on the specific facts.” For example, a uniform is for the primary benefit of the employer if it is special clothing required by the nature of the business; however, if the required uniform is merely ordinary street clothing, the employee would incur that expense as a normal living expense, and it is therefore not primarily for the benefit of the employer. 305 F.3d at 1243-44. Looking at the specific facts applicable in the H-2A context, the court found that one-time transportation costs and visa fees were necessary because of the employers’ decision to bring workers into the country under the visa program for temporary or seasonal workers. However, the workers receive only the right to perform work for the designated employer and, at the conclusion of the specified work period (unless the worker has secured employment with a subsequent H-2A employer) or upon termination of the worker’s employment (whichever occurs first), the worker must leave the country. Because such costs do not routinely arise in the ordinary course of life or work, but are certain to arise under the visa program, the employer is the primary beneficiary and must reimburse workers for them up to the amount needed to satisfy the minimum wage.

In December 2008, six years after the *Arriaga* decision was issued, the Department rejected the holding of *Arriaga* in the preamble to final rule implementing the H-2B program. *See* 73 Fed. Reg. 78020, 78039-41 (December 19, 2008); *see also* 73 Fed. Reg. 77110, 77148-52 (H-2A) (December 18, 2008). The Department for the first time stated that it believed that the better reading of the FLSA and the regulations is that relocation costs under the H-2B program are not primarily for the benefit of the employer, that relocation costs paid for by H-2B workers do not constitute kickbacks within the meaning of 29 CFR 531.35, and that reimbursement of workers for such costs in the first paycheck

is not required by the FLSA. 73 Fed. Reg. at 78039. The preamble concluded that an employee's inbound relocation transportation costs in this context do not constitute a kickback because they "either primarily benefit the employee, or equally benefit the employee and the employer." 73 Fed. Reg. at 78040.

In weighing the relative balance of benefits derived, the preamble emphasized that the travel of such workers far away from their homes not only allows them to earn more money than they could have in their home country over a similar period of time, but also allows them to live and engage in non-work activities in the United States. Foreign workers value these benefits so highly that they have been willing in many instances to pay recruiters thousands of dollars (a practice that the final rule curtailed) just to gain access to the job opportunities. 73 Fed. Reg. at 78040-41. The preamble further noted that the regulation at 29 C.F.R. § 531.32(a) provides that transportation is a facility under section 3(m) when it is furnished to employees between their homes and work, is not compensable, and is not an incident of and necessary to employment. Because the regulation does not expressly distinguish between commuting and relocation costs, the preamble concluded that inbound relocation costs "fit well within the definition as they are between the employee's home country and the place of work." 73 Fed. Reg. at 78041. Disagreeing with *Arriaga*, the preamble stated that both relocation costs and normal commuting expenses are incurred by employees for the purpose of getting to a work site and would not be incurred but for the job. Therefore, "[i]nbound relocation costs are not, absent unusual circumstances, any more an 'incident of * * * employment' than is commuting to a job each day." *Id.* Finally, the preamble concluded that the fact that H-2B workers are temporary guest workers does not change the equation. The facts that the workers derive less benefit from the jobs because they are only temporary, and employers derive a greater-than-usual benefit from such costs because they are only permitted to hire foreign guest workers when they have attempted but are unable to hire U.S. workers, did not change the Department's view. 73 Fed. Reg. at 78041.

Three months later the Department published a notice in the Federal Register withdrawing this preamble interpretation. 74 Fed. Reg. 13261 (March 26, 2009). The Department noted that prior to the preamble interpretation courts had uniformly held that such travel expenses were primarily for the benefit of employers. It also noted that the Department had not sought public comments on this FLSA issue when it published the proposed H-2B rules. Because this is an important issue, with potentially adverse impacts on low-wage U.S. workers and foreign guest workers, the Department withdrew the interpretation for further consideration and stated that it could not be relied upon as a statement of agency policy for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259, or otherwise. The Department also stated that, after reconsideration of the issue, it would provide guidance through a mechanism established for disseminating its opinions and interpretations of the FLSA. ^[2]

Wage and Hour has now completed its review of this issue in the context of the H-2B visa program. We have concluded that our longstanding interpretation is correct. We agree with our 2008 preamble that both the employer and the temporary nonimmigrant workers derive some benefit from these costs and the resulting employment relationship.

We further agree that the issue is whether those expenses are primarily for the benefit or convenience of the employer, because if the employer is the primary beneficiary, it must reimburse an employee for the employee's expenses up to the point that is necessary in order to comply with the requirement that he or she receive the minimum wage free and clear. The preamble inaccurately characterized these expenses as "relocation" costs when in fact the expenses are costs incurred as a result of travel away from the employee's foreign home for temporary employment, not a change in the employee's domicile for permanent employment. Moreover, this situation involves the employer's assertion, and the Department of Labor's certification, that there are not sufficient U.S. workers available to perform the work. After weighing all the factors relevant to transportation and other costs incident to temporary employment under the H-2B program, we believe that the employer is the primary beneficiary of the temporary employee's travel and immigration-related costs.

Courts construing the term "primarily for the benefit of the employer" in the section 3(m) context generally have assessed the relative value of the facility to the employer and the employee. *Soler v. U.S. Department of Labor*, 833 F.2d 1104, 1109 (2d Cir. 1987) ("the balancing of benefits test established by the Regulation provides a common-sense and logical approach"). For example, the court in *Brennan v. Modern Chevrolet Co.*, 363 F. Supp. 327 (N.D. Tex. 1973), *aff'd*, 491 F.2d 1271 (5th Cir. 1974)(table), examined whether the employer or the employees were the primary beneficiaries where a car dealer provided its salesmen with demonstrator cars to drive. The employees used the cars to demonstrate the vehicles to customers. They also drove the cars to and from work and were permitted to use the vehicles for their own personal needs and purposes. In some cases, members of their families also used the vehicles, and 90% of the miles were for personal purposes. Even though the employees clearly derived significant benefit from the use of the vehicles, the court concluded that the dealership was the primary beneficiary because it benefited from having its salesmen driving the product it was engaged in selling, even when they were driving the cars on personal business. The court viewed the cars as tools of the trade necessary to the conduct of the employer's business. *Id.* at 333. *Accord, Marshall v. Sam Dell's Dodge Corp.*, 451 F. Supp. 294, 304 (N.D.N.Y. 1978). Thus, the fact that an employee benefits greatly from an item does not mean that the employee is the primary beneficiary. Indeed, even lodging can be for the primary benefit of the employer, such as when an employer requires an employee to live on-site to meet a particular need of the employer. *Marshall v. DeBord d/b/a/ Bernie's Rest Haven*, 84 Lab. Cas. ¶33,721 (E.D. Okla. 1978) (lodging not a section 3(m) facility where employees lived on-site at nursing home because at least one employee had to be available at all times).

Applying this primary beneficiary analysis in the H-2B context, we first note that employers are only permitted to use the H-2B visa program to bring foreign guest workers into the country in very limited circumstances, and only after the Department of Labor has certified that there are not enough able and qualified U.S. workers available for the position and that the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6). The application process for obtaining a

certification imposes stringent requirements on employers that are unlike their normal employee recruiting procedures. The employers' choice to utilize this process, and their attestation that they are unable to find qualified and available U.S. workers, is evidence of their specific need for, and benefit from, those foreign workers. Indeed, the entire application process is designed to demonstrate to the Department's satisfaction that the employer would not otherwise be able to fulfill its identified employment needs because there are not sufficient U.S. workers available.

For example, under the H-2B program, employers must first engage in recruitment efforts in the U.S. labor market to determine if a qualified U.S. worker is available for the position. In order to ensure that an adequate test of the U.S. labor market is made, the employer must obtain from the government a wage rate that must be offered in the recruitment of U.S. workers (which must be the highest of the prevailing wage rate, the federal minimum wage or the state minimum wage). The employer also must submit a job order to the appropriate State Workforce Agency (SWA) for posting. *See* 20 C.F.R. § 655.15. The job order must include information regarding the job duties, the minimum qualifications required (if any), any special requirements, the expected dates of employment, and the rate of pay. The posting must remain open for at least 10 days. If the area of intended employment is in more than one state, the SWA must forward the information to all the other states listed as anticipated worksites. Where the employer is a party to a collective bargaining agreement covering the occupation at that worksite, the employer also must contact the local affiliate of the labor organization regarding the job opening. The employer must place two newspaper advertisements for the job, including one in the Sunday paper. The employer must: offer and subsequently pay throughout the period of employment a wage that is equal to or higher than the prevailing wage for the occupation at the skill level and in the area of intended employment; provide terms and conditions of employment that are not less favorable than those offered to the foreign workers; and not otherwise inhibit the effective recruitment and consideration of U.S. workers for the job. If the employer has laid off any U.S. workers in the occupation in that area within 120 days prior to the date it will need an H-2B worker, it must notify each laid-off worker of the job opportunity. *See* 20 C.F.R. § 655.15. An employer may apply for a labor certification from the Department only after it has completed its U.S. recruitment efforts. The application requires the employer to provide a description of its business history and activities, and its schedule of operations throughout the year. The employer must demonstrate that its need is a temporary need, and explain how it meets the regulatory standards for a one-time occurrence, or a seasonal, peakload, or intermittent need, in order to qualify for guest workers. The employer also must justify any increase or decrease in the number of H-2B positions being requested from the previous year, if applicable. *See* 20 C.F.R. § 655.20-.22.

The regulations require the employer to prepare and submit to the Department a report regarding its recruitment efforts, including information such as the name and contact information of each U.S. worker who applied or was referred to the job, the disposition of each worker including any applicable laid-off workers, and the lawful job-related reason(s) for not hiring any such U.S. workers. The employer must maintain records of its recruitment efforts for three years, for potential review and audit or investigation by

the Department. *See* 20 C.F.R. § 655.15. The employer is required to attest that it will abide by the conditions applicable to the program, including that it will notify its workers of the requirement that they leave the U.S. at the end of the authorized period of stay or separation from the employer, whichever is earlier. It also must attest that the job is not available because the prior occupants are on strike or locked out in the course of a labor dispute involving a work stoppage. *See* 20 C.F.R. § 655.22.

Under these circumstances, we believe travel and immigration-related costs necessary for workers hired under the H-2B program are for the primary benefit of their employers, and the employers therefore must reimburse the employees for those costs in the first workweek if the costs reduce the employees' wages below the minimum wage.^[3] Congress limited the circumstances in which employers could use this program to the situation where there are not sufficient able, willing and qualified U.S. workers available to perform the temporary labor or services needed, and the employment of the alien worker will not adversely affect the wages and working conditions of similarly-employed U.S. workers. As the program requirements set forth above demonstrate, this visa program imposes significant obligations upon employers in order to ensure that the Department certifies that such a labor shortage exists, and visas therefore may be granted, only in circumstances that protect U.S. workers from any adverse effects caused by the importation of foreign workers. Thus, this process involves the imposition of distinct, additional recruiting requirements on employers. The employers' choice to utilize this process, and their attestation that they are unable to find qualified and available U.S. workers, is evidence of their specific need for, and benefit from, those foreign workers. As the court stated in *Arriaga*, such travel and visa costs "are an inevitable and inescapable consequence" of having foreign workers employed in the United States, and these costs arise out of the employment of such workers. 305 F.3d at 1242, 1244. Therefore, under 29 C.F.R. § 531.32(c), these travel and visa expenses should be viewed as an "incident of and necessary to the employment" because they are not ordinary living expenses (*i.e.*, unlike board and lodging, or electricity, water, or gas for personal use, they do not have substantial value to an employee that can be used independent of the job performed), and they do not ordinarily arise in an employment relationship (unlike daily home-to-work commuting costs).^[4]

Moreover, in contrast to the employers' greater-than-normal benefit from these expenses, the workers benefit from these positions less than employees typically benefit from new jobs. The positions are, by definition, temporary with no possibility of the jobs becoming permanent, no matter how well the employees perform or what skills they acquire. When the work period is completed, and if the employees have not secured subsequent temporary employment under the visa program, the employees have no option to remain in the United States. They are not permitted to seek work from another U.S. employer, except under the visa program, thereby reducing whatever benefit they may have obtained from their ability to enter the country. These temporary jobs require them to move away from their families, friends and home country, to a place where many of the workers have a limited ability to participate in normal social and community activities because of language barriers. Thus, while the employees benefit economically from these temporary jobs, there are countervailing hardships as well.^[5]

Finally, the 2008 preamble emphasized as evidence of the employees' benefit the fact that some workers have been willing to pay their travel and visa costs, and even additional recruiter fees, in order to obtain these jobs. However, an employee's willingness to work for a particular level of wages has never been the test for compliance with the FLSA. Some employees have always been willing to work for less than the minimum wage or to waive their right to overtime for hours worked in excess of 40 in a week. However, employees are not permitted to waive their rights under the FLSA, because it was enacted in order to protect employees from substandard wages and excessive hours in "recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce. . . . No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706-07 (1945). "While in individual cases, hardship may result [from this prohibition on waiver], the restriction will enure to the benefit of the general class of employees in whose interest the law is passed, and so to that of the community at large." *Id.* at 713. Therefore, employees' willingness to bear their inbound travel and visa costs, and thereby to work for wages below the minimum wage, does not establish that the employees are the primary beneficiaries of such expenses. Otherwise, employees' willingness to purchase uniforms required by the nature of the job or to purchase tools of the trade, even if the expense brings their pay below the minimum wage, would similarly demonstrate that such items are for their primary benefit. *See* 29 C.F.R. §§ 531.3(d)(2), 531.32(c). Accordingly, in the context of the H-2B temporary nonimmigrant visa program, we conclude that such travel and visa costs are for the primary benefit of the employer. ^[6] Therefore, the employer must reimburse those costs in the first workweek to the extent that they reduce the employee's wages below the minimum wage.

Questions also have arisen regarding the responsibility for recruiter fees. Recruiters help H-2B employers locate workers in foreign countries. For example, recruiters may find the employees, interview them, and help them process the necessary paperwork to obtain their visas. In the 2008 final rule implementing the H-2B program, the Department provided that the employer must attest that it "has contractually forbidden any foreign labor contractor or recruiter whom the employer engages in international recruitment of H-2B workers to seek or receive payments from prospective employees." 20 C.F.R. § 655.22(g)(2). The preamble to the final rule stated that the Department believes "that requiring employers to incur the costs of recruitment is reasonable, even when taking place in a foreign country . . . The fact that a recruiter is essential to the securing of such worker does not dissuade the Department from requiring the employer to bear the expense; rather, it underscores the classification of that payment as a cost allocable to the employer." 73 Fed. Reg. at 78037. The Department continues to believe that employees should not have to pay a recruiter for access to this visa program, because the employer is the primary beneficiary of these costs. Thus, under both the visa program regulations and the FLSA, we believe that employers are responsible for paying the fees of any recruiters they retain to recruit foreign workers and provide access to the job opportunity. *See Rivera v. Brickman Group, Ltd.*, 2008 WL 81570, at **13-14 (E.D. Pa. 2008) (because

the H-2B employer required the employees to use a particular recruitment company, it was required to reimburse them where the recruiter fees reduced their wages below the FLSA minimum).

Lastly, we believe that obtaining a passport and incurring any related costs are for the primary benefit of the employee as the employee may use the passport for purposes other than employment.

[1] This Field Assistance Bulletin addresses the requirements of the FLSA only in the context of the H-2B program; however, because of the similarities to the H-2A program, we discuss some H-2A rulings because they are relevant by analogy. It also is important to note that, even where other programs impose lesser expense reimbursement requirements than the FLSA, those other programs do not override the FLSA's independent requirements (*see, e.g.*, 20 C.F.R. § 655.22(g)(2) (identifying visa costs as the responsibility of the employee for purposes of the H-2B program, but recognizing that an employer subject to the FLSA may not make deductions that would violate the FLSA)). Furthermore, deductions for expenses that are primarily for the benefit of the employer "that reduce an employee's rate of pay below the highest applicable legally-required minimum wage [such as the H-2B prevailing wage] are illegal *unless* the law establishing that minimum wage allows the particular deductions." Wage and Hour Opinion Letter FLSA2001-7 (Feb. 16, 2001) (emphasis in original); *see De Leon-Granados v. Eller & Sons Trees, Inc.*, 581 F.Supp.2d 1295, 1316 (N.D. Ga. 2008). Thus, employers must always determine their wage requirements under each applicable Act and then apply the highest requirement in order to satisfy all laws. *See Powell v. United States Cartridge Co.*, 339 U.S. 497, 519 (1950).

[2] The FLSA specifically authorizes the Administrator of Wage and Hour to issue a "regulation, order, ruling, approval, or interpretation" of the FLSA and recognizes the Administrator may modify or rescind those interpretations. *See* 29 U.S.C. 259(a). Accordingly, as applicable to employees in the H-2B program, this Field Assistance Bulletin interpreting the FLSA supersedes all prior inconsistent interpretations, including the interpretation set forth in the withdrawn preamble at 73 Fed. Reg. 78039-41, and the enforcement practices set forth in the 1994-2001 letters, as applicable to H-2B workers (*see* pp. 3-4).

[3] The same type of analysis as applied in this Field Assistance Bulletin would have to be performed whenever an employee must travel for temporary employment from the point of hire to a distant worksite location. Whenever the employer is found to be the primary beneficiary, the employer must reimburse such expenses if the failure to do so would bring the employee's wage below the minimum wage.

[4] The 2008 preamble asserted that because § 531.32(a) does not expressly distinguish between daily commuting and relocation costs, these travel and associated costs “fit well” within the regulatory definition of a facility because they are transportation between home and work. Although not expressly stated, we believe that the regulation clearly means that normal daily commuting may be a “facility,” as evidenced by other regulations using similar wording, such as the one implementing section 7(e)(2)’s exclusion from the regular rate of reimbursement for expenses an employee incurs “on his employer’s behalf or where he is required to expend sums solely by reason of action taken for the convenience of his employer.” 29 C.F.R. § 778.217(a). That regulation provides that reimbursement for “temporary *excess* home-to-work travel expenses incurred (i) because the employer has moved the plant to another town before the employee has had an opportunity to find living quarters at the new location or (ii) because the employee, on a *particular occasion*, is required to report for work at a place other than his regular workplace” may be excluded from the regular rate. 29 C.F.R. § 778.217(b)(5) (emphasis added). However, if the reimbursement is not for an expense “incurred by the employee on the employer’s behalf or for his benefit or convenience,” such as where the “employer reimburses the employee for expenses normally incurred by the employee for his own benefit,” the reimbursement must go into the regular rate. 29 C.F.R. § 778.217(d). Therefore, because an “employee normally incurs expenses in traveling to and from work . . . [i]f the employer reimburses him for these *normal everyday expenses*, the payment is not excluded from the regular rate.” *Id.* (emphasis added). Thus, the regulations do not always use talismanic words such as “daily commute”; however, when they refer to travel between home and work, they are referring to a normal, everyday commute in contrast to an “excess” or “particular occasion” commute. Compare 29 C.F.R. § 785.35 (travel from home to work at the beginning of the workday and back to home at the end of the workday is “ordinary home to work travel”) and § 785.37 (travel to a distant city for a special one-day work assignment “cannot be regarded as ordinary home-to work travel”). In any event, the travel expenses in issue here do not comport with the example of a “facility” in § 531.32(a) because they are “an incident of and necessary to the employment.”

[5] We thus disagree with the Fifth Circuit’s recent decision in *Castellanos-Contreras* holding that the FLSA does not require employers to reimburse H-2B employees for their transportation and related fees. 2009 WL 2152622, at *9. The court concluded that, because the FLSA kick-back regulation does not specifically address transportation, visa and recruitment expenses and the Department of Homeland Security and Department of State regulations do not require employers to pay such expenses, they are not employers’ business expenses. *Id.* at *5-7. The court declined to follow *Arriaga* both because that decision involved H-2A, instead of H-2B, and because it relied upon section 3(m) and the “incident of and necessary to” standard in § 531.32 instead of § 531.35 (the kick-back regulation). The court also stated that the fact that the 2009 H-2B regulations newly require employers to forbid their recruiters from charging fees to employees suggests that such fees were not previously an employer expense. We believe that the *Arriaga* court correctly relied upon the section 3(m) principle -- that an employer may take credit only for a facility that is for the employee’s primary benefit and may not require an employee to bear an employer business expense if that will reduce the employee’s pay below the

minimum wage -- as that principle is interpreted in both § 531.32 and § 531.35 (indeed, § 531.35 contains a cross-reference to § 531.32). The fact that § 531.35 does not specifically address transportation, visa and recruitment fees for temporary foreign workers is irrelevant to the analysis. The regulation sets forth the general prohibition against kick-backs and has one example relating to tools of the trade; that does not indicate that kick-backs for other employer expenses are permissible. The *Castellanos-Contreras* decision is, of course, binding precedent in the Fifth Circuit.

[6] The preamble to the final rule stated that “[t]aking the *Arriaga* court’s logic to its ultimate conclusion would potentially subject employers across the U.S. to a requirement to pay relocation expenses for all newly hired employees . . .” 73 Fed. Reg. at 78041. We believe that this statement ignores the many significant differences between the situation in which an employee relocates for permanent employment and temporary employment pursuant to the H-2B visa program. This letter addresses only the specific situation of employers who employ workers for temporary work pursuant to this visa program which, as noted above: may be utilized only when there are not sufficient U.S. workers available and employment of the alien workers will not adversely affect the wages and working conditions of similarly-employed U.S. workers; imposes very different requirements on employers than the normal hiring process; involves atypical expenses; and results in greater-than-normal benefits to employers and less-than-typical benefits to employees.



Application for Temporary Employment Certification

ETA Form 9142 – APPENDIX B.1
U.S. Department of Labor

For Use in Filing Applications Under the H-2B Non-Agricultural Program ONLY

A. Attorney or Agent Declaration

I hereby certify that I am an employee of, or hired by, the employer listed in Section C of the ETA Form 9142, and that I have been designated by that employer to act on its behalf in connection with this application. I also certify that to the best of my knowledge the information contained herein is true and correct. I understand that to knowingly furnish false information in the preparation of this form and any supplement hereto or to aid, abet, or counsel another to do so is a felony punishable by a \$250,000 fine or 5 years in a Federal penitentiary or both (18 U.S.C. 1001).

1. Attorney or Agent's last (family) name	2. First (given) name	3. Middle initial
4. Firm/Business name		
5. E-Mail address		
6. Signature		7. Date signed

B. Employer Declaration

By virtue of my signature below, I HEREBY CERTIFY the following conditions of employment:

1. The job opportunity is a bona fide, full-time temporary position, the qualifications for which are consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations.
2. The job opportunity is not vacant because the former occupant(s) is (are) on strike or locked out in the course of a labor dispute involving a work stoppage.
3. The job opportunity is open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship, and the employer has conducted the required recruitment, in accordance with regulations, and has been unsuccessful in locating sufficient numbers of qualified U.S. applicants for the job opportunity for which certification is sought. Any U.S. workers who applied or apply for the job were or will be rejected only for lawful, job-related reasons, and the employer must retain records of all rejections.
4. The offered terms and working conditions of the job opportunity are normal to workers similarly employed in the area(s) of intended employment and are not less favorable than those offered to the foreign worker(s) and are not less than the minimum terms and conditions required by Federal regulation at 20 CFR 655, Subpart A.
5. The offered wage equals or exceeds the highest of the prevailing wage, the applicable Federal, State, or local minimum wage, and the employer will pay the offered wage during the entire period of the approved labor certification.
6. The offered wage is not based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage, or the legal Federal or State minimum wage, whichever is highest.
7. During the period of employment that is the subject of the labor certification application, the employer will comply with applicable Federal, State and local employment-related laws and regulations, including employment-related health and safety laws;
8. The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the Application for Temporary Employment Certification in the area of intended employment within the period beginning 120 days before the date of need, except where the employer also attests that it offered the job opportunity that is the subject of the application to those laid-off U.S. worker(s) and the U.S. worker(s) either refused the job opportunity or was rejected for the job opportunity for lawful, job-related reasons.



Application for Temporary Employment Certification

ETA Form 9142 – APPENDIX B.1
U.S. Department of Labor

9. The employer and its agents and/or attorneys have not sought or received payment of any kind from the employee for any activity related to obtaining labor certification, including payment of the employer's attorneys' fees, application fees, or recruitment costs. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor.
10. Unless the H-2B worker is being sponsored by another subsequent employer, the employer will inform H-2B workers of the requirement that they leave the U.S. at the end of the period certified by the Department or separation from the employer, whichever is earlier, as required under § 655.35, and that if dismissed by the employer prior to the end of the period, the employer is liable for return transportation.
11. Upon the separation from employment of any foreign worker(s) employed under the labor certification application, if such separation occurs prior to the end date of the employment specified in the application, the employer will notify the Department and DHS in writing or any other method specified of the separation from employment not later than forty-eight (48) hours after such separation is discovered by the employer.
12. The employer will not place any H-2B workers employed pursuant to this application outside the area of intended employment listed on the Application for Temporary Employment Certification unless the employer has obtained a new temporary labor certification from the Department.
13. The dates of temporary need, reason(s) for temporary need, and number of worker positions being requested for certification have been truly and accurately stated on the application.
14. If the application is being filed as a job contractor, the employer will not place any H-2B workers employed pursuant to the labor certification application with any other employer or at another employer's worksite unless:
 - (i) The employer applicant first makes a bona fide inquiry as to whether the other employer has displaced or intends to displace a similarly employed U.S. worker within the area of intended employment within the period beginning 120 days before and throughout the entire placement of the H-2B worker, the other employer provides written confirmation that it has not so displaced and does not intend to displace such U.S. workers; and
 - (ii) All worksites are listed on the certified Application for Temporary Employment Certification

I hereby designate the agent or attorney identified in section D (if any) of the ETA Form 9142 to represent me for the purpose of labor certification and, by virtue of my signature in Block 3 below, **I take full responsibility** for the accuracy of any representations made by my agent or attorney.

I declare under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained therein is true and accurate. *I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a felony punishable by a \$250,000 fine or 5 years in the Federal penitentiary or both (18 U.S.C. 1001).*

1. Last (family) name	2. First (given) name	3. Middle initial
4. Title		
5. Signature		6. Date signed

FAQs – Implementation of Final H-2B Regulations for Temporary Labor Certifications in the Entertainment Industry

Question: I am an employer in the entertainment industry. We recruited our H-2B support personnel and filed pursuant to special procedures for entertainers. Now that the regulations have changed, are my special procedures gone?

Answer: The new H-2B regulations contain a provision that permits the development of special procedures. Where special procedures were in place prior to the effective date of the H-2B regulations (January 18, 2009), the Department will continue to honor those special procedures to the extent they are consistent with the new regulations. The special procedures contained in TEGL 31-05 will continue almost in their entirety. The Department will not, however, be able to honor the special procedures in areas in which they are in direct contravention of the regulation, as outlined in these FAQs.

Question: Who qualifies as an entertainer for H-2B status?

Answer: Occupations in the entertainment industry, for purposes of applying for a labor certification for H-2B workers, shall include performers and all technical and support personnel involved with a performance, including carnival workers.

Question: As an employer of entertainers who enter the US in H-2B status, where do I file?

Answer: All H-2B applications are filed with the Certifying Officer at the Chicago National Processing Center (CNPC). Employers are no longer required to submit applications for H-2B temporary employment of foreign workers to one of the Offices Specializing in Entertainment (OSEs) in New York, New York; Austin, Texas; or Sacramento, California.

Question: I hire musicians from Canada. Has how their recruitment changed?

Answer: It has not changed. As discussed in TEGL 31-05, where you recruit depends on where the musicians appear. Canadian musicians who enter the US to perform within a 50-mile area adjacent to the Canadian border for a period of 30 days or less are pre-certified and are not subject to these procedures. In such cases, employers may file petitions to employ nonimmigrant workers (I-129) directly with USCIS in accordance with that agency's guidelines; no pre-recruitment is necessary. If the entertainers you seek to bring to the US in H-2B status are not able to fall within this limited exemption, you must follow the procedures outlined in the H-2B regulations, subject only to special procedures outlined in TEGL 31-05 (such as an itinerary).

Question: I hire workers in the Virgin Islands. There used to be special procedures for them. Are they still in place?

Answer: Yes. There continue to be in place the special procedures with respect to the amount of time that an H-2B worker in the entertainment industry may enter the U.S. Virgin Islands. The Virgin Islands Nonimmigrant Alien Adjustment Act of 1981, Pub. L. 97-271, limits temporary employment of entertainers in the U.S. Virgin Islands to periods not to exceed 45 days. Therefore, the period of labor certification for such applications may not exceed 45 days.

Question: My workers appear in several places. I used to be able to file one application and submit an itinerary. Can I still do that?

Answer: An employer seeking H-2B workers in the entertainment industry may still utilize an itinerary when filing an application. The application must include an itinerary of locations and duration of work in each location.

Question: Has when I may file an H-2B application changed?

Answer: Yes. The final regulation requires employers, including those seeking H-2B workers in the entertainment industry, to file their H-2B application after completion of the recruitment report detailing their efforts and the outcome of U.S. worker applicants. The creation of the required recruitment report cannot occur, pursuant to 20 CFR 655.15(j)(1), until after the completion of the US worker recruitment, specifically no earlier than 2 days after the last date on which the job order was posted and at least 5 days after the last date on which the newspaper or journal ad was placed. Recruitment may not start until 120 days prior to the employer's date of need.

Question: How do I begin the filing process?

Answer: Before recruiting US workers, the employer must request and obtain a prevailing wage determination from the CNPC, in accordance with the procedures specified at 20 CFR 655.10. The rate must be valid either on the date recruitment begins or on the date of filing a complete ETA Form 9142. The employer will request a prevailing wage determination by completing the ETA Form 9141, *Application for Prevailing Wage Determination*, and including a listing of all worksites covered by the job opportunity. The CNPC will enter its wage determination on the ETA Form 9141, indicate the sources, and return the form with its endorsement to the employer within 30 days of receipt of the request. The validity period of the wage determination may be for no more than 1 year or less than 3 months from the wage determination date.

Question: How do I get a prevailing wage if I have multiple worksites?

Answer: The employer must list all worksites within an area of intended employment on its ETA Form 9141 when requesting a prevailing wage. If the job opportunity involves multiple worksites within an area of intended employment and different prevailing wage rates exist for the same opportunity within the area of intended employment, the prevailing wage shall be the highest wage among all relevant worksites. Employers submitting a prevailing wage determination covering itinerary locations will receive a wage determination for each location listed on the itinerary for work to be performed in that location.

Question: I have just received my prevailing wage from the CNPC. Can I offer that salary only to my H-2B workers?

Answer: Pursuant to statute and regulation, the employer must offer the wage determination from the CNPC (or higher) to both its H-2B workers and any similarly employed U.S. worker hired in response to the recruitment required by the regulations and these special handling procedures.

Question: Do I follow the regulations and recruit before I file the application?

Answer: All H-2B recruitment is undertaken prior to submission of the application. Employers file with the CNPC only after completing the recruitment report detailing their efforts and the outcome of U.S. workers who applied, or on whose behalf an application was made, for the job opportunity.

Question: When do I recruit?

Answer: Recruitment of US workers may not commence more than 120 days before the employer's start date of need for the H-2B workers. An employer seeking H-2B workers may file with the CNPC only after completing the recruitment report as noted above. The creation of a recruitment report cannot occur, pursuant to 20 CFR 655.15(j)(1), until after the completion of the recruitment period, specifically no earlier than 2 days after the last date on which the state job order was posted and at least 5 days after the last date on which the newspaper or journal ad was placed.

Question: How do I recruit?

Answer: An employer seeking certification for H-2B job opportunities, including opportunities in the entertainment industry, must undertake the following recruitment steps:

1. Submit a job order to the SWA serving the area of intended employment as specified in 20 CFR 655.15(e). Where the job opportunity requires the work to be performed in more than one state based on an itinerary, the job order should be submitted to the SWA having jurisdiction over the area where the employment will begin. The SWA receiving the job order shall promptly transmit, on behalf of

the employer, a copy of the active job order to all states listed as anticipated worksites. When submitting the job order to the SWA, the employer must clearly identify it as a job order to be placed in connection with a future application for H-2B workers.

2. Publish advertisements on 2 separate days, which may be consecutive, one of which must be a Sunday advertisement, in a newspaper of general circulation serving the area of intended employment as specified in 20 CFR 655.15(f). The employer may satisfy this requirement by advertising the job opportunity in a national publication that is likely to bring responses from U.S. workers.

3. Where the employer is a party to a collective bargaining agreement governing the job classification that is subject of the H-2B labor certification, the employer must contact the local union that is party to the agreement as specified in 20 CFR 655.15(g)

At the conclusion of the recruitment period, the employer shall prepare a written recruitment report as specified in 20 CFR 655.15(j), to be submitted with the application.

Question: How long will the SWA job order be open?

Answer: The SWA must keep the job order open for a period of not less than 10 calendar days. If the SWA requires a longer period in order to adequately recruit US workers for the job opportunity (e.g., 30 calendar days), the employer must comply with the requirement and continue to accept referrals of US workers until the end of the recruitment period.

Question: Can I reject workers who are not willing to join the itinerary? For example, I have worksites in 6 states. If a worker sees the recruitment in the third state, can he join for just that state?

Answer: He can if you are willing to have him join in only that state, and the certification will be reduced accordingly for the entire itinerary. If you prefer, you may reject that worker, unless he is in fact willing to work for the rest of the itinerary.

Question: Where do I file my application?

Answer: Temporary labor certification applications for foreign workers in the entertainment industry shall be filed by employer with the CNPC at the following address:

Chicago National Processing Center
Office of Foreign Labor Certification
U.S. Department of Labor

844 North Rush Street
12th Floor
Chicago, IL 60611
Attn: CNPC Certifying Officer, H-2B Application for Entertainers

Question: How do I include my itinerary with the application?

Answer: When filed, the application must include: A completed ETA Form 9142, Application for Temporary Employment Certification signed by the employer; an itinerary of locations and duration of work in each location, where there is more than one worksite, and a wage offer for each location listed on the itinerary for work performed in that location which can be submitted as an attachment to the ETA Form 9142. The completed application must also include a copy of the recruitment report completed in accordance with 20 CFR 655.15(j).

Question: Once the CNPC has my application, what can I expect?

Answer: The CNPC will make a determination to either grant or deny the *Application for Temporary Employment Certification*. The CNPC will notify the employer in writing (either electronically or by US Mail) of the labor certification determination. The CNPC will review complete applications for an absence of errors that would prevent certification and for compliance with the criteria for certification. Criteria for certification include whether the employer has established the need for the nonagricultural services or labor to be performed is temporary in nature; established that the number of worker positions being requested is justified and represent bona fide job opportunities; made all the assurances and met all the obligations required by § 655.22; and complied with all requirements of the program.

If the CNPC determines that the employer has made all necessary attestations and assurances, but the application fails to comply with one or more of the criteria for certification, the CNPC will issue a Request for Information (RFI) to the employer. The CNPC will issue the written (RFI) within 7 calendar days of the receipt of the application, and send it by means normally assuring next-day delivery.

FAQs on H-2B Final Rule Round One

The Department published a Final Rule on the labor certification process and enforcement for H-2B employment on December 19, 2008, which became effective on January 18, 2009. The Final Rule made some significant changes in the processing of applications for H-2B labor certifications. The following "Frequently Asked Questions" (FAQs) are in response to questions arising from the application of the new regulations.

Transition to New Procedures (For applications filed on or after January 18, 2009 for employment with start dates before October 1, 2009)

Question: I have a need for H-2B workers that starts September 1, 2009. When do I begin recruitment?

Answer: An employer is required by the regulation to begin recruitment no more than 120 calendar days before the employer's date of need for H-2B workers.

Question: During the transition period, as an employer I understand that I need to file the prevailing wage request form with the State Workforce Agency (SWA). Once I get the prevailing wage from the SWA, how does the SWA know to place the job order and the contents of the job order if it does not get the initial Form ETA-9142, Application for Temporary Employment Certification?

Answer: A SWA does not need the ETA 9142 to create or place a job order. An employer is required by the regulation to submit a job order to the SWA serving the area of intended employment no more than 120 calendar days before the employer's date of need for H-2B workers. The employer may place a job order with the SWA by utilizing whatever form or electronic system the SWA employs for such orders. The employer may also submit the request to the SWA and have the SWA place the order. Regardless of whether the employer places the job order without SWA assistance or requests that the SWA place the job order on its behalf, the employer must identify in the job order itself that the job order is being placed in connection with a future application for H-2B workers.

Question: Prior to October 1, 2009, am I supposed to file the ETA-750 with the State Workforce Agency (SWA), or must I file the ETA-9142?

Answer: The ETA-750 is no longer used to file an application for labor certification for H-2B positions, and as of January 18, 2009, the SWAs no longer receive applications. All applications for labor certification for the purpose of seeking H-2B workers must be filed on form ETA-9142, using Appendix B.1 as

well as the form. The ETA-9142, Appendix B.1, and the Recruitment Report should be filed directly with the Chicago NPC, not the SWA, for adjudication.

Prevailing Wage

Question: Can you tell me when we will need to start using the ETA-9141 for prevailing wage determinations? Will there be instructions posted on how to complete the form?

Answer: For the purposes of the prevailing wage during the transition period, the employer will use whatever form the State Workforce Agency has for such purposes. For any date of need on or after October 1, 2009, the employer will file the ETA-9141, the Prevailing Wage Determination Request form, with the NPC to receive a prevailing wage determination. OFLC will post the form on the OFLC website in time for employers with an October 1, 2009 date of need to utilize it.

Form ETA-9142

Question: Where do I find the NAICS Code that the ETA -9142 asks for on page 2, Section C, Item 13 and what is it?

Answer: "NAICS" stands for the North American Industry Classification System, which is a coding system that classifies all businesses into specific categories enabling statisticians and others in the government and in the private sector to identify trends and keep track of information based on industries. The accompanying instructions to the Form ETA-9142 provide the web address for the Census Bureau, which maintains the NAICS coding system. The code selected by the employer should reflect the nature of the employer's business, not the job for which certification is sought. A listing of NAICS codes can be found at <http://www.census.gov/epcd/www/naics.html>

Question: Where do I find the SOC (ONET/OES) Code and SOC (ONET/OES) Occupation Title requested on page 1, Section B questions 2 and 3 of the new ETA Form 9142?

Answer: Link to <http://www.flcdatcenter.com/OesQuick.aspx> and click on the drop down box under "OR Select an occupation from the list." The number on the left is the SOC code and the title to the right is the Occupation Title.

Question: The employer completes a narrative statement regarding item 9 of ETA Form 9142, but must retain the supporting documents. Can these

documents be submitted with the application instead of in response to the National Processing Center (NPC)'s Request For Information (RFI)?

Answer: No. These documents will be requested under the RFI process outlined in 20 CFR 655.23(c) if the employer has made all necessary attestations and assurances but failed to comply with one or more of the certification criteria set forth in 20 CFR 655.23(b). If the regulatory requirements for certification are met, the petition will be certified and the employer should keep any supporting documents demonstrating temporary need for three years from the date of certification in case of a post-certification audit. Supporting evidence is not defined by the regulations, but the Department has historically considered charts of permanent and temporary employees, payroll records, and signed contracts setting forth the dates of employment to demonstrate temporary need.

Question: Where do we send the completed Application for Temporary Employment Certification?

Answer: The completed application must be sent directly to the Chicago National Processing Center. The address is:

U.S. Department of Labor
Employment and Training Administration
Chicago National Processing Center
844 N. Rush Street
12th Floor
Chicago, IL 60611

Recruitment

Question: What is my pre-filing recruitment obligation and when must I place the first ad?

Answer: An employer may not place a newspaper advertisement until it has received a prevailing wage (from the State Workforce Agency (SWA) during the transition period or from the Chicago NPC after the transition period). Once an employer has received a prevailing wage it can submit a job order to the SWA serving the area of intended employment and then publish two print advertisements, one of which should be on a Sunday unless no Sunday edition exists (see 20 CFR 655.15(f) for exceptions) during the time the job order is posted with the SWA. The job order cannot be placed more than 120 days prior to the date of need.

In addition, if the employer is a party to a collective bargaining agreement governing the job classification that is subject of the H-2B application, then the employer must formally contact the local union and maintain copies of

correspondence and/or dated logs demonstrating contact with the union, result of such contact, and the number of qualified referrals received from the union. Likewise, if the employer laid off any employees in the same job occupation within 120 days of the first date of need, the employer must document that it has notified or will notify each laid-off worker of the job opportunity and has considered or will consider each laid-off worker who has expressed interest in the opportunity, and the result of the notification and consideration.

Finally, the employer must prepare a Recruitment Report and submit it with the Application for Temporary Employment Certification. The Recruitment Report cannot be prepared any earlier than 2 calendar days after the last date on which the job order was posted and no earlier than 5 calendar days after the last newspaper advertisement was published.

Question: When can I begin my recruitment activities?

Answer: No earlier than 120 days prior to the first date of need.

Question: Can I combine several H-2B job opportunities into one advertisement?

Answer: No. Each job opportunity must have its own advertisement in order to sufficiently apprise potential workers of the job duties.

Question: How long must my recruitment run?

Answer: The job order must be posted with the State Workforce Agency in the area of intended employment for no less than 10 full days. The newspaper advertisements must be published while the job order is posted.

Question: When is the deadline for submitting the Recruitment Report and the Application for Temporary Employment Certification (ETA-9142) along with Appendix B.1?

Answer: The regulations do not specify the last date an employer can submit an application. The regulations do, however, specify the earliest an employer can begin recruitment (120 days prior to first date of need) and the earliest that a Recruitment Report can be created (2 calendar days after the last date on which the job order was posted and 5 calendar days after the last newspaper advertisement was published). The Recruitment Report is necessary to filing a completed Application for Temporary Employment Certification; therefore, an application may not be filed until at least that time that a recruitment report can

be completed. The Recruitment Report and Application for Temporary Employment Certification should not be submitted to the Chicago National Processing Center until all qualified U.S. worker applicants have been considered.

Question: The SWA says they will not place my job order but that I must place it myself, is that right?

Answer: Many SWAs now have automated self-service systems. In those instances, you will be required to place the order yourself, however, you must contact the SWA immediately upon placing the job order and let them know that you have placed an H-2B job order. Your job order must state that it is being filed in support of a future H-2B application.

Question: The SWA states that I must keep my job order active for 30 days, must I?

Answer: The Department of Labor requires that employers post their job orders and keep them active for at least 10 days. If a SWA requires a longer period, then the employer must comply with this requirement and continue to accept referrals. In such an instance, the employer cannot submit its application to the Department until the earliest that a Recruitment Report can be created, i.e. 2 calendar days after the last date on which the job order was posted and 5 calendar days after the last newspaper advertisement is published. The Recruitment Report is necessary to filing a completed Application for Temporary Employment Certification; therefore, an application may not be filed until at least 2 days after the end of the required posting period. Employers seeking to file applications for temporary labor certification for H-2B workers should therefore determine the requirements for posting in the applicable SWA well in advance of the intended employment to ensure compliance. Employers are also reminded that they must keep the job order active until all print advertisements have been published.

Question: What should the Recruitment Report contain?

Answer: The Recruitment Report must identify each recruitment source by name; list the name and contact information for each U.S. worker who applied or was referred, and the disposition of each worker, including any applicable laid-off workers; indicate whether the worker was hired or not and if the worker was not hired, list the lawful job-related reasons for not hiring the worker. There is no required format or form for a recruitment report other than it contain these elements.

Question: Do I submit newspaper ad tear sheets with the Recruitment Report which is now filed directly with your office?

Answer: An employer is not required to submit evidence of the placement of such advertisements, such as newspaper tear sheets, with the Application for Temporary Employment Certification. The employer must attest to the dates on which the advertisements were placed, and must maintain copies of the newspaper pages, tear sheets, or other proof of publication containing the text of the advertisement and dates of publication for 3 years from the date of certification, to be presented to the Department in the event of a request for additional information prior to adjudication, an audit or other investigation.

Question: Do I need to submit copies of resumes or applications with my Application for Temporary Employment Certification?

Answer: No. An employer is not required to submit copies of resumes or job application forms completed by job applicants with its Application for Temporary Employment Certification. However, the employer must maintain for 3 years resumes and evidence of contact with each U.S. worker who applied or was referred to the job opportunity, to be provided to the Department in response to an RFI, audit, or other investigation.

Question: What are the employer's obligations with respect to contacting labor unions?

Answer: The H-2B regulations at 20 CFR 655.15(g) require an employer that is a party to a collective bargaining agreement (CBA) covering the job classification that is the subject of the H-2B labor certification application to formally contact the local union that is a party to the CBA. Such contact may be by U.S. mail or other effective means during the same period of time that the SWA is circulating a copy of the employer's job offer within the state. After contact, the employer must maintain dated logs demonstrating: (1) that the union was contacted and notified timely of the position openings; (2) whether the union referred qualified U.S. worker(s); (3) the number of U.S. workers that were referred, if applicable; and (4) whether or not the union was responsive to the employer's request.

Question: What are the SWA obligations with respect to contacting labor unions?

Answer: The Department strongly recommends that a SWA, which has knowledge that the employer's job opportunity is in an occupation that is traditionally unionized, circulate a copy of the intrastate job order to all applicable

unions and other sources of recruitment and apprise these sources of the available position(s) within the area of intended employment. To ensure that the labor unions and other sources of recruitment will have a sufficient amount of time to apprise their members to apply for the available position(s), we strongly recommend that the SWA contact the union on the first day that it places the intrastate job order on its active file for recruitment and request that referrals of applicants be made to the SWA within the active recruitment period. Last, the SWA should allow a reasonable period of time, e.g., 3 calendar days after the close of the job order, for referrals sent the day the order closed to be received and considered by the SWA.

In accordance with 20 CFR 655.15(e)(1), the SWA must place the job order no more than 120 calendar days before the employer's date of need for H-2B workers for a period of not less than 10 calendar days.

Recruitment Fees

Question: Pursuant to the Final Rule, employers and their attorneys or agents are prohibited from seeking or receiving "payment of any kind from the employee for any activity related to obtaining the labor certification, including payment of the employer's attorneys' or agent fees, ... or recruitment costs." This includes any monetary payments, wage concessions, kickbacks, bribes, tributes, in kind payments, and free labor. Does this prohibition apply to petitions that were filed prior to January 18, 2009 and does it apply only to workers abroad or in-country as well?

Answer: Applications that were filed before January 18, 2009 are being adjudicated under the regulations in effect at the time of filing. The prohibition on seeking or receiving payment from the employee for any activity relating to the obtaining of the labor certification therefore does not apply to them. For those applications filed on or after January 18, 2009, the prohibition applies to recruiter and other fees charged to any foreign workers, whether in the U.S. or abroad, relating to the obtaining of the labor certification.

Former Regulations vs. New Regulations

Question: If an H-2B application has been certified with dates of need from 02/01/2009 to 12/01/2009, is this application governed by the new regulations or can we file a petition with USCIS under the former rules?

Answer: Once an application is certified by the Department of Labor it is valid for the duration of the certification and can be filed with USCIS. What procedures an employer should utilize to file a certified labor certification with the Department of Homeland Security's USCIS and whether or not their new

regulations, promulgated simultaneously with ours, prohibit the use of a labor certification certified under the old regulations is a question that needs to be posed to USCIS.

Application for Temporary Employment Certification
ETA Form 9142
U.S. Department of Labor



Please read and review the filing instructions carefully before completing the ETA Form 9142. A copy of the instructions can be found at <http://www.foreignlaborcert.doleta.gov/>. In accordance with Federal Regulations, incomplete or obviously inaccurate applications will not be certified by the Department of Labor. If submitting this form non-electronically, ALL required fields/items containing an asterisk (*) must be completed as well as any fields/items where a response is conditional as indicated by the section (§) symbol.

A. Employment-Based Nonimmigrant Visa Information

1. Indicate the type of visa classification supported by this application (Write classification symbol): *	
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B. Temporary Need Information

1. Job Title *		
2. SOC (ONET/OES) code *	3. SOC (ONET/OES) occupation title *	
4. Is this a full-time position? * <input type="checkbox"/> Yes <input type="checkbox"/> No	Period of Intended Employment	
	5. Begin Date * <i>(mm/dd/yyyy)</i>	6. End Date * <i>(mm/dd/yyyy)</i>
7. Worker positions needed/basis for the visa classification supported by this application		
<input type="text"/> Total Worker Positions Being Requested for Certification *		
Basis for the visa classification supported by this application <i>(indicate the total workers in each applicable category based on the total workers identified above)</i>		
<input type="text"/> a. New employment *	<input type="text"/> d. New concurrent employment *	
<input type="text"/> b. Continuation of previously approved employment * without change with the same employer	<input type="text"/> e. Change in employer *	
<input type="text"/> c. Change in previously approved employment *	<input type="text"/> f. Amended petition *	
8. Nature of Temporary Need: (Choose only one of the standards) *		
<input type="checkbox"/> Seasonal <input type="checkbox"/> Peakload <input type="checkbox"/> One-Time Occurrence <input type="checkbox"/> Intermittent or Other Temporary Need		
9. Statement of Temporary Need *		

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C. Employer Information

Important Note: Enter the full name of the individual employer, partnership, or corporation and all other required information in this section. For joint employer or master applications filed on behalf of more than one employer under the H-2A program, identify the main or primary employer in the section below and then submit a separate attachment that identifies each employer, by name, mailing address, and total worker positions needed, under the application.

1. Legal business name *		
2. Trade name/Doing Business As (DBA), if applicable		
3. Address 1 *		
4. Address 2		
5. City *	6. State *	7. Postal code *
8. Country *	9. Province	
10. Telephone number *	11. Extension	
12. Federal Employer Identification Number (FEIN from IRS) *	13. NAICS code (must be at least 4-digits) *	
14. Type of employer application (choose only one box below) *		
<input type="checkbox"/> Individual Employer <input type="checkbox"/> Association – Sole Employer (H-2A only)		
<input type="checkbox"/> H-2A Labor Contractor or Job Contractor <input type="checkbox"/> Association – Joint Employer (H-2A only) <input type="checkbox"/> Association – Filing as Agent (H-2A only)		

D. Employer Point of Contact Information

Important Note: The information contained in this Section must be that of an employee of the employer who is authorized to act on behalf of the employer in labor certification matters. The information in this Section must be different from the agent or attorney information listed in Section E, unless the attorney is an employee of the employer. For joint employer or master applications filed on behalf of more than one employer under the H-2A program, enter only the contact information for the main or primary employer (e.g., contact for an association filing as joint employer) under the application.

1. Contact's last (family) name *	2. First (given) name *	3. Middle name(s) *
4. Contact's job title *		
5. Address 1 *		
6. Address 2		
7. City *	8. State *	9. Postal code *
10. Country *	11. Province	
12. Telephone number *	13. Extension	14. E-Mail address

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E. Attorney or Agent Information (If applicable)

1. Is/are the employer(s) represented by an attorney or agent in the filing of this application (including associations acting as agent under the H-2A program)? If "Yes", complete Section E. *		<input type="checkbox"/> Yes	<input type="checkbox"/> No
2. Attorney or Agent's last (family) name §	3. First (given) name §	4. Middle name(s) §	
5. Address 1 §			
6. Address 2			
7. City §		8. State §	9. Postal code §
10. Country §		11. Province	
12. Telephone number §	13. Extension	14. E-Mail address	
15. Law firm/Business name §		16. Law firm/Business FEIN §	
17. State Bar number (only if attorney) §		18. State of highest court where attorney is in good standing (only if attorney) §	
19. Name of the highest court where attorney is in good standing (only if attorney) §			

F. Job Offer Information

a. Job Description

1. Job Title *	
2. Number of hours of work per week Basic *: _____ Overtime: _____	3. Hourly Work Schedule * A.M. (h:mm): ____ : ____ P.M. (h:mm): ____ : ____
4. Does this position supervise the work of other employees? * <input type="checkbox"/> Yes <input type="checkbox"/> No	4a. If yes, number of employees worker will supervise (if applicable) § _____
5. Job duties – A description of the duties to be performed MUST begin in this space. If necessary, add attachment to <u>continue and complete</u> description. *	

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F. Job Offer Information (continued)

b. Minimum Job Requirements

1. Education: minimum U.S. diploma/degree required *	
<input type="checkbox"/> None <input type="checkbox"/> High School/GED <input type="checkbox"/> Associate's <input type="checkbox"/> Bachelor's <input type="checkbox"/> Master's <input type="checkbox"/> Doctorate (PhD) <input type="checkbox"/> Other degree (JD, MD, etc.)	
1a. If "Other degree" in question 1, specify the diploma/degree required §	1b. Indicate the major(s) and/or field(s) of study required § (May list more than one related major and more than one field)
2. Does the employer require a second U.S. diploma/degree? *	
<input type="checkbox"/> Yes <input type="checkbox"/> No	
2a. If "Yes" in question 2, indicate the second U.S. diploma/degree and the major(s) and/or field(s) of study required §	
3. Is training for the job opportunity required? *	
<input type="checkbox"/> Yes <input type="checkbox"/> No	
3a. If "Yes" in question 3, specify the number of <u>months</u> of training required §	3b. Indicate the field(s)/name(s) of training required § (May list more than one related field and more than one type)
4. Is employment experience required? *	
<input type="checkbox"/> Yes <input type="checkbox"/> No	
4a. If "Yes" in question 4, specify the number of <u>months</u> of experience required §	4b. Indicate the occupation required §
5. Special Requirements - List specific skills, licenses/certifications, and requirements of the job opportunity. *	

c. Place of Employment Information

1. Worksite address 1 *	
2. Address 2	
3. City *	4. County *
5. State/District/Territory *	6. Postal code *
7. Will work be performed in multiple worksites within an area of intended employment or a location(s) other than the address listed above? *	
<input type="checkbox"/> Yes <input type="checkbox"/> No	
7a. If Yes in question 7, identify the geographic place(s) of employment with as much specificity as possible. If necessary, submit an attachment to <u>continue and complete</u> a listing of all anticipated worksites. §	

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G. Rate of Pay

1. Basic Rate of Pay Offered * From: \$ _____ . _____ To (Optional): \$ _____ . _____	1a. Overtime Rate of Pay (if applicable) § From: \$ _____ . _____ To (Optional): \$ _____ . _____
2. Per: (Choose only one) * <input type="checkbox"/> Hour <input type="checkbox"/> Week <input type="checkbox"/> Bi-Weekly <input type="checkbox"/> Month <input type="checkbox"/> Year <input type="checkbox"/> Piece Rate	
2a. If Piece Rate is indicated in question 2, specify the wage offer requirements: §	
3. Additional Wage Information (e.g., multiple worksite applications, itinerant work, or other special procedures). If necessary, add attachment to <u>continue and complete</u> description. §	
4. For H-2A applications where the rate of pay is based upon multiple crop or agricultural activities , please confirm that Appendix A.1 is complete and being submitted with the filing of this application. §	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A

H. Recruitment Information

1. Name of State Workforce Agency (SWA) serving the area of intended employment *		
2. SWA job order identification number *	2a. Start date of SWA job order *	2b. End date of SWA job order *
3. Is there a Sunday edition of a newspaper (of general circulation) in the area of intended employment? *		<input type="checkbox"/> Yes <input type="checkbox"/> No
4. Name of Newspaper/Publication (in area of intended employment) *	Dates of Print Advertisement *	
5.	From:	To:
6. Additional Recruitment Activities. Use the space below to identify the type(s) or source(s) of recruitment, geographic location(s) of recruitment, <u>and</u> the date(s) on which recruitment was conducted. If necessary, add attachment to <u>continue and complete</u> description. *		

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I. Declaration of Employer and Attorney/Agent

In accordance with Federal regulations, the employer must attest that it will abide by certain terms, assurances and obligations as a condition for receiving a temporary labor certification from the U.S. Department of Labor. Applications that fail to attach Appendix A.2 or Appendix B.1 will be considered incomplete and not accepted for processing by the ETA application processing center.

1. For H-2A Applications ONLY, please confirm that you have read and agree to all the applicable terms, assurances and obligations contained in Appendix A.2. §	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
2. For H-2B Applications ONLY, please confirm that you have read and agree to all the applicable terms, assurances and obligations contained in Appendix B.1. §	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A

J. Preparer

Complete this section if the preparer of this application is a person other than the one identified in either Section D (employer point of contact) or E (attorney or agent) of this application.

1. Last (family) name §	2. First (given) name §	3. Middle initial §
4. Job Title §		
5. Firm/Business name §		
6. E-Mail address §		

K. U.S. Government Agency Use (ONLY)

Pursuant to the provisions of Section 101 (a)(15)(h)(ii) of the Immigration and Nationality Act, as amended, I hereby certify that there are not sufficient U.S. workers available and the employment of the above will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. By virtue of the signature below, the Department of Labor hereby acknowledges the following:

This certification is valid from _____ to _____.

Department of Labor, Office of Foreign Labor Certification

Determination Date (date signed)

Case number

Case Status

L. OMB Paperwork Reduction Act (1205-0466)

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's reply to these reporting requirements is mandatory to obtain the benefits of temporary employment certification (Immigration and Nationality Act, Section 101 (a)(15)(H)(ii)). Public reporting burden for this collection of information is estimated to average 2 hours 10 minutes per response for H-2A and 2 hours 45 minutes for H-2B, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Office of Foreign Labor Certification * U.S. Department of Labor * Room C4312 * 200 Constitution Ave., NW * Washington, DC * 20210. **Do NOT send the completed application to this address.**

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IMPORTANT: Please read these instructions carefully before completing the ETA Form 9142 –Application for Temporary Employment Certification. These instructions contain full explanations of the questions and attestations that make up the ETA Form 9142. ***In accordance with Federal Regulations, incomplete or obviously inaccurate applications will not be certified by the Department of Labor. ALL required fields/items must be completed as well as any fields/items where a response is conditioned on the response to another required field/item.***

Anyone, who knowingly and willingly furnishes any false information in the preparation of ETA Form 9142 and any supporting documentation, or aids, abets, or counsels another to do so is committing a federal offense, punishable by fine or imprisonment up to five years or both (18 U.S.C. §§ 2, 1001). Other penalties apply as well to fraud or misuse of this immigration document and to perjury with respect to this form (18 U.S.C. §§ 1546, 1621).

OMB Notice: These reporting instructions have been approved under the Paperwork Reduction Act of 1995. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's reply to these reporting requirements is mandatory to obtain the benefits of temporary employment certification (Immigration and Nationality Act, Section 101(a)(15)(H)(ii)). Public reporting burden for this collection of information is estimated to average 2 hours and 10 minutes for H-2A and 2 hours and 45 minutes for H-2B per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Office of Foreign Labor Certification * U.S. Department of Labor * Room C4312 * 200 Constitution Ave., NW * Washington, DC * 20210. **Do NOT send the completed application to this address.**

Section A
Employment - Based Nonimmigrant Visa Information

1. Enter the following classification symbol to indicate the type of visa supported by this application: **"H-2A"** or **"H-2B"**

Section B
Temporary Need Information

1. Enter the title of the job opportunity for which the application for temporary employment certification is being sought by the employer.
2. Enter the six or eight-digit Standard Occupational Classification (SOC)/Occupational Network (O*NET) code for the occupation, which most clearly describes the work to be performed. For example, the six-digit SOC code for a fruit or vegetable harvester or orchard worker is 45-2092.02 (Farmworkers and Laborers, Crop).
3. Enter the occupational title associated with the SOC/O*NET (OES) code. For example, the occupational title associated with SOC/O*NET code 45-2092.02 is "Farmworkers and Laborers, Crop".
4. Enter whether this position is full-time by indicating "Yes" or "No".
5. Enter the beginning date for the worker's period of employment. Use a month/day/full year (MM/DD/YYYY) format.
6. Enter the end date for the worker's period of employment. Use a month/day/full year (MM/DD/YYYY) format.
7. The collection of this item contains two parts. First, enter the number of workers being requested for certification. Second, use collection items (a) through (f) to enter the number of workers in each applicable category based on the answer to the first part of this item. Every box **MUST** be filled. If the employer has no workers in a particular category or does not know which categories apply, enter "0 (zero)."

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8. Mark the appropriate box to indicate the nature of the employer's temporary need for the services or labor to be performed. Only one standard of temporary need may be selected. The following definitions generally apply to temporary agricultural and non-agricultural work:

Seasonal Need: The employer must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The employer shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the employer's permanent employees.

Peakload Need: The employer must establish that (1) it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand, and (2) the temporary additions to staff will not become a part of the employer's regular operation.

One-Time Occurrence: The employer must establish that either (1) it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or (2) it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker(s).

Intermittent or Other Temporary Need: For intermittent needs, the employer must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods. This box should also be marked in circumstances where the nature of the employer's need for the services or labor to be performed is other than seasonal, peakload, one-time occurrence, or intermittent.

9. Provide a statement clearly describing the employer's temporary need for the services or labor to be performed. The employer's statement must explain (a) the nature of the employer's business or operations, (b) why the job opportunity and number of workers being requested for certification reflect a temporary need, and (c) how the employer's request for the services or labor to be performed meets the chosen standard under Question 8 of a seasonal, peakload, one-time occurrence, or an intermittent basis.

Important Note: For only applications filed under the H-2A program where the nature of the employer's temporary need is marked as "seasonal" under Question 8, enter "N/A" and continue to the next section.

Section C Employer Information

1. Enter the full legal name of the business, person, association, firm, corporation, or organization, i.e., the employer filing this application. The employer's full legal name is the exact name of the individual, corporation, LLC, partnership, or other organization that is reported to the Internal Revenue Service.

Important Note: For joint employer or master applications filed on behalf of more than one employer under the H-2A program, identify the main or primary employer in this section and then submit a separate attachment that identifies each employer, by name, mailing address, and total worker positions needed, under the application..

2. Enter the full trade name or "Doing Business As" (DBA) name, if applicable, of the business, person, association, firm, corporation, or organization, i.e., the employer filing this application.
3. Enter the street address of the employer's principal place of business.
4. If additional space is needed for the street address, use this line to complete the employer's street address.
5. Enter the city of the employer's principal place of business. If the city and country are the same, the name must still be entered in both fields.
6. Enter the state of the employer's principal place of business.

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7. Enter the postal (zip) code of the employer's principal place of business.
 8. Enter the country of the employer's principal place of business. If the city and country are the same, the name must still be entered in both fields.
 9. Enter the province of the employer's principal place of business, if applicable.
 10. Enter the area code and telephone number for the employer's principal place of business. Include country code, if applicable.
 11. Enter the extension of the telephone number for the employer's principal place of business, if applicable.
 12. Enter the nine-digit Federal Employer identification Number (FEIN) as assigned by the IRS. Do not enter a social security number.
- Note:** All employers, including private households, **MUST** obtain an FEIN from the IRS before completing this application. Information on obtaining an FEIN can be found at www.irs.gov.
13. Enter the four to six-digit North American Industry Classification System (NAICS) code that best describes the employer's business, not the alien's job. A listing of NAICS codes can be found at <http://www.census.gov/epcd/www/naics.html>
 14. Mark the appropriate to indicate the type of application being filed for temporary employment certification. Only one application type can be selected.

Section D
Employer Point of Contact Information

An employer point of contact is an employee of the employer whose position authorizes the employee to provide information and supporting documentation concerning this Application for Temporary Employment Certification and to communicate with the Department of Labor on behalf of the employer. The employer point of contact should be the individual most familiar with the content of this application and circumstances of the foreign worker's employment.

Important Note: For joint employer or master applications filed on behalf of more than one employer under the H-2A program, enter only the contact information for the main or primary employer (e.g., contact for an association filing as joint employer) under the application in this section. If the association is filing as an agent under the H-2A program, skip questions 1 to 14 and continue to Section E. In these circumstances, the association filing as an agent need only provide a listing of its employer members under the application, as collected and instructed under Section C above.

Note: The employer point of contact information in this Section, specifically the name, telephone number, and email address, must be different from the attorney/agent information listed in Section E, unless the attorney is an employee of the employer.

1. Enter the last (family) name of the employer's point of contact.
2. Enter the first (given) name of the employer's point of contact.
3. Enter the middle initial of the employer's point of contact.
4. Enter the job title of the employer's point of contact.
5. Enter the business street address for the employer's point of contact.
6. If additional space is needed for the street address, use this line to complete the street address.
7. Enter the city of the employer's point of contact. If the city and country are the same, the name must still be entered in both fields.
8. Enter the state of the employer's point of contact.

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9. Enter the postal (zip) code of the employer's point of contact.
 10. Enter the country of the employer's point of contact. If the city and country are the same, the name must still be entered in both fields.
 11. Enter the province of the employer's point of contact, if applicable.
 12. Enter the area code and business telephone number of the employer's point of contact. Include country code, if applicable.
 13. Enter the extension of the telephone number of the employer's point of contact, if applicable.
 14. Enter the business e-mail address of the employer's point of contact in the format [name@emailaddress.top-level](#) domain.
-

Section E
Attorney or Agent Information (if applicable)

Note: The attorney/agent information in this Section, specifically the name, telephone number, and email address, must be different from the employer's point of contact information in Section D, unless the attorney is an employee of the employer. If an association is filing as an agent under the H-2A program, this section must be completed.

1. Identify whether the employer is represented by an attorney or agent in the process of filing this application. Only mark one box. If "Yes" complete the remainder of Section E. If "No" in question 1, skip questions 2 to 19 and continue to Section F. Associations filing H-2A applications as an agent on behalf of one or more of its grower members must mark "Yes" to this question.
2. Enter the last (family) name of the attorney/agent.
3. Enter the first (given) name of the attorney/agent.
4. Enter the middle initial of the attorney/agent.
5. Enter the street address of the attorney/agent.
6. If additional space is needed for the street address, use this line to complete the attorney/agent's street address.
7. Enter the city of the attorney/agent. If the city and country are the same, the name must still be entered in both fields.
8. Enter the state of the attorney/agent.
9. Enter the postal (zip) code of the attorney/agent.
10. Enter the country of the attorney/agent. If the city and country are the same, the name must still be entered in both fields.
11. Enter the province of the attorney/agent, if applicable.
12. Enter the area code and telephone number of the attorney/agent. Include country code, if applicable.
13. Enter the extension of the telephone number of the attorney/agent, if applicable.
14. Enter the e-mail address of the attorney/agent in the format [name@emailaddress.top-level](#) domain
15. Enter the attorney/agent's law firm or business name.
16. Enter the attorney/agent's law firm or business nine-digit FEIN as assigned by the IRS.

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17. Enter the attorney's state Bar number. If the attorney is licensed in more than one state, enter only one state Bar number. If the attorney is licensed in a state which does not issue state Bar numbers, enter "N/A."

Note: The answers to questions 18 and 19 below should correspond to the same state for which a Bar number was provided in question 17, if any.

18. Enter the state of the highest court where the attorney is in good standing.

19. Enter the name of the highest court in the state where the attorney is in good standing.

Section F
Job Offer Information

a. Job Description

1. Enter the same job title as the one entered under Section B question 1.
2. Enter the basic hours of work required per week and, if applicable, overtime hours per week in accordance with State and Federal law for the work and area of employment.
3. Enter the daily work schedule for the job opportunity (e.g., 9 a.m. to 5 p.m., 7 a.m. to 11 a.m. and 4 p.m. to 8 p. m.).
4. Mark "Yes" or "No" as to whether the job opportunity supervises the work of other employees.
5. If "Yes" is marked in question 4, enter the total number of employees the job opportunity will supervise.
6. Describe the job duties, in detail, to be performed by any worker filling the job opportunity. Specify any equipment to be used and pertinent working conditions.

b. Minimum Requirements

1. Identify whether the minimum U.S. diploma or degree required by the employer for the job opportunity is none, high school/GED, Associates, Bachelor's, Master's, Doctorate, or Other. Only mark one box.
 - 1-A. If "Other" in question 1, enter the specific U.S. diploma or degree required. (Example: JD, MD, DDS, etc.). If the answer to question 1 is not "Other," enter "N/A."
 - 1-B. Enter the major(s) and/or field(s) of study required by the employer for the job opportunity. You may list more than one field and/or more than one related major. If the answer to question 1 is "None" or "High School", enter "N/A."
2. If the employer requires a second U.S. diploma or degree for the job opportunity, mark "Yes." Otherwise, mark "No."
 - 2-A. If "Yes" in question 2, enter the specific second U.S. diploma or degree required. If the answer to question 2 is "No", enter "N/A."
3. If the employer requires training for the job opportunity, mark "Yes." Otherwise, mark "No." Training may include, but is not limited to: programs, coursework, or training experience (other than employment). When answering this question, do not duplicate requirements – the training required should not be counted as education or experience required.
 - 3-A. If "Yes" in question 3, enter the number of months of training required by the employer for the job opportunity. If the answer to question 3 is "No", enter "0" (zero). When answering this question, do not duplicate time requirements – the training time required should not be counted as (added to) education or experience time required.
 - 3-B. If "Yes" in question 3, enter the field(s) and/or name(s) of the training required by the employer for the job opportunity. You may list more than one field and/or more than one name. If the answer to question 3 is "No", enter "N/A."

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4. If the employer requires employment experience, mark "Yes." Otherwise, mark "No."
 - 4-A. If "Yes" in question 4, enter the number of months of experience required by the employer. If the answer to question 4 is "No", enter "0" (zero).
 - 4-B. If "Yes" in question 4, enter the occupation in which experience is required by the employer for the job opportunity. If the answer to question 4 is "No", enter "N/A."
 5. Enter the job related special requirements. Examples are shorthand and typing speeds, specific foreign language proficiency, test results, specific skills, licenses, or certificates.
-

Section F
Job Offer Information (continued)

c. Place of Employment

It is important for the employer to define the area of intended employment with as much geographic specificity as possible. This information is used for purposes of reviewing and verifying regulatory compliance with advertising, positive recruitment requirements, and prevailing wage determinations.

Important Note: For H-2A labor contractors filing an application covering multiple areas of intended employment, submit a separate attachment identifying the name and physical location of each fixed-site agricultural business where the services or labor is expected to be performed, the expected beginning and end dates when the H-2A labor contractor will be providing the workers to each fixed-site, and a description of the crops and activities the workers are expected to perform at each fixed-site.

1. Enter the street address of the worksite location identified in question 1, where work will be performed. The worksite address must be a physical location and cannot be a P.O. Box.
 2. If additional space is needed for the street address, use this line. If no additional space is needed, enter "N/A."
 3. Enter the city of the worksite location.
 4. Enter the county of the worksite location.
 5. Enter the state/district/territory of the worksite location.
 6. Enter the postal (zip) code of the worksite location.
 7. If work will be performed in location(s) other than the address listed in questions 1-6 above, mark "Yes" and complete question 7-A. If work will not be performed in location(s) other than the address listed in questions 1-6 above, mark "No."
 - 7-A. If "Yes" in question 7, identify the geographic place(s) of employment with as much specificity as possible, such as the Metropolitan Statistical Areas (MSAs) or the city(ies)/township(s)/county(ies) and the corresponding state(s) where work will be performed. The employer must provide enough geographic detail to cover all the worksite locations of intended employment. If necessary, submit an attachment to continue and complete a listing of all anticipated worksites.
-

Section G
Rate of Pay

1. Enter the rate of pay to be paid to the nonimmigrant workers. If the wage offer is expressed as a range, enter the bottom of the wage range to be paid.

Enter the top of the wage range to be paid to the nonimmigrant workers in the section indicating "To (Optional)."

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1-A. Enter the rate of overtime pay, if applicable, to be paid to the nonimmigrant workers. If the wage offer is expressed as a range, enter the bottom of the wage range to be paid.

Enter the top of the wage range to be paid to the nonimmigrant workers in the section indicating "To (Optional)."

2. Enter whether the rate of pay is in terms of per year, month, two weeks, week or hour in the section indicating "Rate is Per." Mark only one box.

2-A. If the answer to question 2 is "Piece Rate", enter the wage offer requirements. Describe the unit size that governs how the piece rate is paid, such as tree size/spacing, weight/size/number of boxes picked/packed, dimensions of bags or boxes filled. For example: 5/8 bushel, 90 pound bag or box, 10 box bin.

3. Enter any additional wage information covered by the job opportunity and the anticipated area(s) of intended employment (e.g., itinerant work, multi-state worksite locations). In order to expedite the application review process, employers are **strongly encouraged** to list all valid prevailing wage determinations received by the OFLC National Processing Center (NPC) in support of the application as well as all corresponding wage offers.

4. If the Application for Temporary Employment Certification is being filed under the H-2A program and the job offer and rate of pay will be based on multiple crop or agricultural activities, indicate whether Appendix A.1 is complete and being submitted with the filing of this application by answering "Yes" or "No". If the job opportunity is offering a single rate of pay, then mark "N/A".

Section H
Recruitment Information

1. Enter the name of the State Workforce Agency which received the job offer from the employer and placed a job order on its active file for recruitment of U.S. workers.

2. Enter the unique job order number provided by the State Workforce Agency.

2-A Enter the start date of the SWA job order. Use a month/day/full year (MM/DD/YYYY) format.

2-B Enter the end date of the SWA job order. Use a month/day/full year (MM/DD/YYYY) format.

3. Mark "Yes" or "No" whether there is a Sunday edition of a newspaper (of general circulation) in the area of intended employment.

4. Enter the name of the newspaper of general circulation or other publication in which the employer placed an advertisement for the job opportunity.

For the named newspaper/publication, enter the start and end dates in which the newspaper advertisement referenced was printed. Use a month/day/full year (MM/DD/YYYY) format. If the newspaper advertisement or publication took place on 1 day, then enter the same date in the "From:" and "To:".

5. Enter the name of the newspaper of general circulation or other publication in which the employer placed an advertisement for the job opportunity.

For the named newspaper/publication, enter the start and end dates in which the newspaper advertisement referenced was printed. Use a month/day/full year (MM/DD/YYYY) format. If the newspaper advertisement or publication took place on 1 day, then enter the same date in the "From:" and "To:".

6. Describe other efforts to positively recruit U.S. workers for the job opportunity. For each positive recruitment activity, identify the type or source of recruitment (e.g., additional SWA job orders, out-of-state newspaper, contact with former employees) and the date(s) on which the recruitment was conducted. If necessary, submit an attachment to continue and complete the description.

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Section I
Declaration of Employer and Attorney/Agent

Employer must read and agree to all the applicable terms, assurances, and obligations as a condition for receiving a temporary labor certification from the U.S. Department of Labor.

1. If the application is being filed under the H-2A program, mark "Yes" or "No" to confirm that Appendix A.2 is complete and being submitted with the filing of this application. Mark Question 2 as "N/A."
2. If the application is being filed under the H-2B program, mark "Yes" or "No" to confirm that Appendix B.1 is complete and being submitted with the filing of this application. Mark Question 1 as "N/A."

Section J
Preparer

This section must be completed if the preparer of this application is a person other than the one identified in either Section D (employer point of contact) or E (attorney or agent) of this application.

1. Enter the last (family) name of the person preparing this application by or on behalf of the employer.
2. Enter the first (given) name of the person preparing this application by or on behalf of the employer.
3. Enter the middle initial of the person with preparing this application by or on behalf of the employer.
4. Enter the Firm/Business name of the person with preparing this application by or on behalf of the employer.
5. Enter the email address of the person with preparing this application by or on behalf of the employer. Format must be in the format [name@emailaddress.top-level](#) domain.

Section K
U.S. Government Agency User ONLY

Read this section. No entries required.

Section L
OMB Paperwork Reduction Act/Information Control Number 1205-0310

Read this section. No entries required.

APPENDIX A.1
Rate of Pay Information for Multiple Crop or Agricultural Activities

This appendix must only be completed for applications for temporary labor certification filed under the H-2A program. The rate of pay for each crop or agricultural activity covered by the application must be disclosed in this appendix. For each crop or agricultural activity, the following information must be disclosed (where applicable):

1. Enter the name of the crop or agricultural activity.
2. If applicable, enter the hourly rate of pay. In no event may rate be less than the applicable FLSA or State minimum, or the applicable prevailing hourly wage rate, whichever is higher.
3. If applicable, enter the piece rate of pay.
4. If a piece rate of pay is entered, describe the unit used when piece rates are being paid. Describe the unit size that governs how the piece rate is paid, such as tree size/spacing, weight/size/number of boxes picked/packed, dimensions of bags or boxes filled. For example: 5/8 bushel, 90 pound bag or box, 10 box bin.

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5. Describe 1) Any bonus or incentives aside from the flat rate or piece rate, e.g., garden space, milk, eggs, meat, health insurance; 2) Special conditions on guaranteed weeks of work, under what conditions bonuses or incentives are to be paid, if any; 3) If the activity is covered by a "schedule of rates", indicate conditions under which each of the rates on the schedule applies; 4) Describe frequency of pay arrangements, e.g., daily, weekly, biweekly; 5) Indicate deductions to be made from workers' wages, such as Social Security, workers' compensation, health insurance, Federal or state tax. If applicable, note whether employer of record or farm labor contractor will be responsible for deductions.
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APPENDIX A.2
Employer and Attorney/Agent Declarations (H-2A Applications ONLY)

A. Attorney/Agent Declaration

1. Enter the last (family) name of the attorney/agent representing the employer in the filing of this application.
2. Enter the first (given) name of the attorney/agent representing the employer in the filing of this application.
3. Enter the middle initial of the attorney/agent representing the employer in the filing of this application.
4. Enter the Firm/Business name of the attorney/agent representing the employer in the filing of this application.
5. Enter the email address of the attorney/agent representing the employer in the filing of this application. Format must be in the format [name@emailaddress.top-level](#) domain.
6. The attorney/agent must sign the application. Read the entire application and verify all contained information prior to signing.
7. The attorney/agent must date the application. Use a month/day/full year (MM/DD/YYYY) format.

B. Employer Declaration

1. Enter the last (family) name of the person with authority to sign on behalf of the employer.
 2. Enter the first (given) name of the person with authority to sign on behalf of the employer.
 3. Enter the middle initial of the person with authority to sign on behalf of the employer.
 4. Enter the job title of the person with authority to sign on behalf of the employer.
 5. The person with authority to sign on behalf of the employer must sign the application. Read the entire application and verify all contained information prior to signing.
 6. The person with authority to sign on behalf of the employer must date the application. Use a month/day/full year (MM/DD/YYYY) format.
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APPENDIX B.1
Employer and Attorney/Agent Declarations (H-2B Applications ONLY)

A. Attorney/Agent Declaration

1. Enter the last (family) name of the attorney/agent representing the employer in the filing of this application.
2. Enter the first (given) name of the attorney/agent representing the employer in the filing of this application.
3. Enter the middle initial of the attorney/agent representing the employer in the filing of this application.
4. Enter the Firm/Business name of the attorney/agent representing the employer in the filing of this application.
5. Enter the email address of the attorney/agent representing the employer in the filing of this application. Format must be in the format [name@emailaddress.top-level](#) domain.

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6. The attorney/agent must sign the application. Read the entire application and verify all contained information prior to signing.
 7. The attorney/agent must date the application. Use a month/day/full year (MM/DD/YYYY) format.
- B. Employer Declaration**
1. Enter the last (family) name of the person with authority to sign on behalf of the employer.
 2. Enter the first (given) name of the person with authority to sign on behalf of the employer.
 3. Enter the middle initial of the person with authority to sign on behalf of the employer.
 4. Enter the job title of the person with authority to sign on behalf of the employer.
 5. The person with authority to sign on behalf of the employer must sign the application. Read the entire application and verify all contained information prior to signing.
 6. The person with authority to sign on behalf of the employer must date the application. Use a month/day/full year (MM/DD/YYYY) format.